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In The

Supreme Court of the United States

IRWIN SCHIFF, individually and doing business as FREEDOM BOOKS, www.livetaxfree.com; www.Paynoincometax.com and www.ischiff.com,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does an author lose his rights under the First Amendment because portions of his book suggest that his readers consider purchasing other products (e.g., books, other written publications and audio tapes), some of which are deemed to be unprotected commercial speech?

II. When deciding whether the censorship or regulation of a book is constitutional, must the book be considered as a whole to determine whether it is "commercial speech" or "pure speech?"

III. Is there one or two definitions of commercial speech?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

United States of America, Plaintiff-Appellee

Irwin Schiff, Defendant-Appellant

Cynthia Neun, Defendant

Lawrence N. Cohen, aka Larry Cohen, Defendant

Neither Petitioner Irwin Schiff nor any of the other non-government parties are a corporation. Therefore there is no parent or publicly held company holding 10% or more of any corporation's stock.

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United States v. Schiff, 379 F.3d 621 (9th Cir. 2004).

United States v. Schiff, 269 F. Supp. 2d 1262 (D. Nev. 2003).

BASIS FOR JURISDICTION

(i) The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court of Nevada was entered on August 9, 2004.

(ii) The order of the United States Court of Appeals for the Ninth Circuit denying Appellant Irwin Schiff's Petition for Rehearing was entered on January 12, 2005. *United States v. Schiff*, 269 F. Supp. 2d 1262 (D. Nev. 2003).

(iii) This petition for writ of certiorari was filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

(iv) The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, RULES OF CIVIL PROCEDURE AND ORDINANCES INVOLVED

United States Constitution, Amendment I. "Congress shall make no law . . . abridging the freedom of speech[.]"

26 U.S.C. § 7407. Action to enjoin income tax return preparers.

26 U.S.C. § 7408. Actions to enjoin specified conduct related to tax shelters and reportable transactions.

26 U.S.C. § 7402. Jurisdiction of district courts.

26 U.S.C. § 6700. Promoting abusive tax shelters, etc.

26 U.S.C. § 6701. Penalties for aiding and abetting understatement of tax liability.

STATEMENT OF THE CASE

I. Basis for Jurisdiction in the Lower Courts.

The United States of America (the "Government") brought the underlying action in the United States District Court, District of Nevada, under 26 U.S.C. §§ 7402, 7407 and 7408. The Government alleged that Mr. Schiff has engaged in activity subject to penalty under Internal Revenue Code ("I.R.C.") §§ 6694, 6695, 6700 and 6701.

The District Court's Order was an interlocutory order granting a Preliminary Injunction and was therefore appealable to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1292(a)(1).

II. Background.

Mr. Schiff is the author of several books, including *The Federal Mafia.*[1] Mr. Schiff operates Freedom Books in Las Vegas, Nevada, which publishes and sells his books and audiotapes about the Government, the economy and the tax laws, as well as books authored and published by others.[2] *The Federal Mafia* was ***first published in 1980*** long before most of the products objected to the Government as giving rise to the underlying cause were published or recorded. *The Federal Mafia* is not only sold by Freedom Books, it is also sold by other bookstores and distributors (e.g., Barnes & Noble, Amazon.com and E-Bay). ***Approximately 13 years after the First Edition of The Federal Mafia was published***, the Government seeks to ban the book arguing that it is nothing more than false commercial speech, which aids and abets crime.

In his book *The Federal Mafia*, Mr. Schiff embarks on a rather interesting study of the Constitution and Internal Revenue Code (I.R.C.); discusses his own experiences with the IRS and federal judiciary and outlines his theories about federal income taxes. Mr. Schiff opines that the payment of income taxes is voluntary and, citing *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916), that earnings from wages, salary, dividends, interest, alimony, etc. are not subject to the income tax because such a tax is applied directly to sources of income. (*The*

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[1] *The Great Income Tax Hoax; The Biggest Con: How The Government Is Fleecing You; How An Economy Grows And Why It Doesn't; The Kingdom of Moltz.*

[2] *The I.R.C., The Code of Federal Regulations, Federal Rules of Civil Procedure, Fundamentals of Litigation for Paralegals and The Power To Destroy.*

Federal Mafia, pp. 41-42). Mr. Schiff opines that the IRS is illegally enforcing an *unapportioned direct tax* on individuals' sources of income, and an *unapportioned direct tax* on corporations' profits, instead of a *uniform excise tax* on those profits. (*The Federal Mafia*, p. 43) (Emphasis in original).

The Federal Mafia contains approximately 304 pages. It contains twelve chapters, an Epilogue, Addendum To Second Edition, Revised Appendix To Second Edition and a two-page Reference Material Section.

Chapters 1 and 2 discuss why Mr. Schiff believes our income tax provisions are voluntary. Chapter 3 analyzes the Internal Revenue Code itself. Chapter 4 outlines why Mr. Schiff believes income taxes must be assessed. In Chapter 5, Mr. Schiff argues that the federal government is breaking our laws when it collects income tax from individuals. In Chapter 6, Mr. Schiff explains why he believes no law establishes a liability for income tax and discusses his civil and criminal tax evasion cases. In Chapter 7, Mr. Schiff attacks the issue of the IRS's right to levy upon all property.

In Chapter 8, Mr. Schiff discusses the methods by which the Government requires employers, banks, brokerages, corporations and casinos to withhold taxes from individuals' salary, wages, dividends, interest, stock transactions and wagering. Mr. Schiff explains why he believes that withholding taxes are not income taxes and explains how a payee may complete a certification that he is not subject to withholding. Chapter 8 includes eleven (11) figures. Nine of the eleven figures are reproductions of relevant sections of the I.R.C. or actual IRS forms. Mr. Schiff discusses the actual language of the applicable

I.R.C. sections and opines on the inconsistency between the various forms and actual language contained in the I.R.C. He discusses the "exemption" process concerning Form W-4 and discuses his opinion on why people have a right to assert an exemption. He outlines the basis for asserting exemptions and explains how one might assert the right. He also provides an example of how the assertion, pursuant to Section 3402(n) of the I.R.C., may be presented to the IRS. However, Mr. Schiff specifically writes that although he opines that one may correctly assert no tax or no withholdings, a person who undertakes these steps may very well be fined $500.00 for filing an "incorrect W-4." (*The Federal Mafia,* p. 157). In fact, Mr. Schiff even warns that the IRS may assert that anyone who claims "exempt" may be charged with an affirmative act of tax evasion. Furthermore, the Notes to Chapter 8 repeat all of Mr. Schiff's admonitions and even explain that people who utilize these theories have been put into jail. (*The Federal Mafia,* p. 167). The *Federal Mafia* is clearly not a "how to book," but actually a "how not to" or a "how things should" be book in the opinion of Mr. Schiff.

In Chapter 8 of *The Federal Mafia*, Mr. Schiff states his opinion of his understanding of the law; expresses how one should be able to address the I.R.C. requirements and then clearly and unequivocally explains that although he believes he is correct, the IRS may fine anyone who undertakes to implement Mr. Schiff's opinions for violating the law. This is not false and fraudulent commercial speech. Chapter 8 of *The Federal Mafia* is not a "how to chapter" within a "how to manual."

In Chapter 9, Mr. Schiff argues that there is no law requiring an individual to be subject to a tax audit. In Chapters 10 and 11, Mr. Schiff discusses the litigation

process. Chapter 12 is an overview of the United States' economy.

In the Epilogue, Mr. Schiff mainly discusses his experiences in federal prison system and the basis upon which he decided to file "zero" income tax returns. The vast majority of the Epilogue explains how the various federal district courts and appellate courts rejected Mr. Schiff's arguments. Again, the Epilogue is not a "how to" complete a 1040 with zeros. Instead, it explains exactly why Mr. Schiff did file zero income returns for the years 1980 through 1988. (*The Federal Mafia*, p. 244). There is nothing commercial about his representation nor is it false. Mr. Schiff did file zero returns.

In the Addendum To Second Edition, Mr. Schiff again discusses his legal entanglements with the Government. The Addendum does provide a copy of a 1998 1040 as Figure A-9. Why? Mr. Schiff explains that this is an exemplar of the types of returns he had filed. What is the significance of this document? The entire section focuses on Mr. Schiff's ongoing criminal case court proceedings. The section is autobiographical.

The Ninth Circuit has rejected many of Mr. Schiff's theories.[3] Although Mr. Schiff firmly believes in his convictions about the I.R.C. and disagrees with the Ninth

[3] *Wilcox v. Commissioner of Internal Revenue*, 848 F.2d 1007, 1008 (1988) (payment of income tax is not voluntary (optional); *Carter v. Commissioner*, 784 F.2d 1006, 1009 (9th Cir. 1986) (paying taxes is not voluntary and "[I]ncome may be taxed without apportionment under the Sixteenth Amendment."); *see also Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985); *but see Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604 (1991) (a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable).

Circuit's rulings, he warns his readers on the backside of the first page of his book after the cover, which is on the readers left side opposite the Dedication, that:

> This book is designed to provide the author's findings and opinion, based on research and analysis of the subject matter covered. ***This information is not provided for purposes of rendering legal or otherwise professional services, which can only be provided by knowledgeable professionals*** on a fee basis.
>
> Further, there is always an element of risk in standing up for one's lawful rights[.]
>
> Therefore, ***the author and publisher disclaim any responsibility for any liability of loss incurred as a consequence of the use and application, either directly or indirectly, of any advice or information presented herein.***

The Federal Mafia (Emphasis added).

Mr. Schiff's admonishments do not stop at the front page. In Chapter 8, Mr. Schiff repeats his convictions that income taxes are voluntary, but specifically states in very clear language that applying the information discussed in his book may result in the reader being jailed. *The Federal Mafia*, p. 167 (I must again warn you regarding the use of this information . . . **But, by doing so, you run the risk of going to jail!**).

At all times relevant hereto, Mr. Schiff's Website, www.paynoincometax.com, also contained a warning to anyone considering implementing Mr. Schiff's tax theories:

> Warning: This site should not be relied upon as constituting legal advice, but all information contained herein, should be verified against the statutes as they appear in the Internal Revenue Code, and relevant court decisions.

III. Procedural History and Court Opinions.

The Government filed its Complaint For Permanent Injunction And Other Relief, as well as its Motions For Temporary Restraining Order ("TRO") and Preliminary Injunction on March 12, 2003, alleging that Schiff engages in activity that violates 26 U.S.C. §§ 6694, 6695, 6700, 6701 and 7407 and that *The Federal Mafia* is merely a tax scam. *United States v. Schiff*, 269 F. Supp. 2d 1262, 1264 (D. Nev. 2003).

The District Court issued a Preliminary Injunction banning the publication and distribution of *The Federal Mafia*; mandating that Mr. Schiff post the injunction on his Websites; mandating that Mr. Schiff produce a list (names, phone numbers, addresses, E-mails, social security numbers and EINs) of all persons to whom he has sold books from January 1, 1999 to present and enjoining Mr. Schiff from speaking, writing or distributing his theories, views and beliefs concerning the tax laws in any context or in any medium (the "Injunction"). *United States v. Schiff*, 269 F. Supp. 2d 1262, 1264-65 (D. Nev. 2003).

The District Court issued its Order pursuant to I.R.C. § 7408. *United States v. Schiff*, 269 F. Supp. 2d 1262, 1264-65 (D. Nev. 2003). The District Court concluded that it could ban *The Federal Mafia*, without infringing on Mr. Schiff's First Amendment rights, because (1) *The Federal Mafia* is false commercial speech; (2) *The Federal Mafia*

incites imminent lawless action; and (3) *The Federal Mafia* is part of a scheme that, in part, has a stated purpose of assisting in the commission of a crime. The District Court also relied on I.R.C. §§ 7402 and 7407 to require Mr. Schiff and Freedom Books to "provide their complete list of people . . . who bought any product or service[.]" Finally, the District Court, pursuant to I.R.C. § 7402, also mandated that Mr. Schiff place a copy of the Preliminary Injunction at the top of the "Home Page" on his Websites www.paynoincometax.com and www.ischiff.com. *United States v. Schiff*, 269 F. Supp. 2d 1262, 1284-86 (D. Nev. 2003).

The Ninth Circuit Court of Appeals upheld the lower court's decision. *United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004). Ignoring the fact that *The Federal Mafia* has been published for years prior to the introduction of the products and services complained about by the Government, the Ninth Circuit argued that *The Federal Mafia* is the "linchpin" to an entire line of tax avoidance products and services created by Irwin Schiff. *United States v. Schiff*, 379 F.3d 621, 627 (9th Cir. 2004).

The Ninth Circuit concluded that *The Federal Mafia* is fraudulent commercial speech because the book acts as "an advertisement for Schiff's full range of tax-avoidance products and services." *United States v. Schiff*, 379 F.3d 621, 629 (9th Cir. 2004). Therefore, the Ninth Circuit surmised that *The Federal Mafia* is an integral part of Schiff's whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax.

IV. Summary of the Issues.

What the Ninth Circuit failed to explain is why *The Federal Mafia* is commercial speech and why it must be banned if the lower court's injunction properly enjoined the sale of the alleged "commercial products" referred to in *The Federal Mafia*.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeal's decision seems to conflict with the Supreme Court's definition of "commercial speech" in *Central Hudson Gas & Electric Corp. v. Pu. Serv. Comm'n*, 447 U.S. 557, 65 L. Ed. 2d 341, 96 S. Ct. 2343 (1980); *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983).

The panel's decision also conflicts with other decisions within the Ninth Circuit Court of Appeals defining "commercial speech." *American Academy of Pain Management v. Fox, M.D.*, 353 F.3d 1099 (9th Cir. 2004); *Hoffman v. Capital Cities/ABC*, 255 F.3d 1180 (9th Cir. 2001) and *Mattel v. Universal Music International*, 296 F.3d 894 (9th Cir. 2002).

Mr. Schiff argues that the Ninth Circuit Court of Appeals, like the District Court, used the wrong definition of commercial speech in determining whether *The Federal Mafia* is commercial speech, as opposed to pure or intertwined speech.

The Ninth Circuit acknowledged that neither the Government nor the United States District Court specifically

stated which pages of *The Federal Mafia* meet the Government's definition of commercial speech and presumed that it was Chapter Eight, Epilogue and Addendum to the Second Edition. *United States v. Schiff*, 379 F.3d 621, 627 (9th Cir. 2004) ("Although neither the government nor the district court, which adopted the government's definition of commercial speech, specifically states which pages would meet this broad definition of commercial speech, it can be assumed the government believes that, at least, Chapter 8 ("How to Stop Paying Income Taxes") and the Epilogue and Addendum to the Second Edition (Which give instructions how to file the "zero-income" returns and samples of such returns) would qualify as *commercial speech under this definition*.")

In *Schiff*, the Ninth Circuit acknowledged, "The definition of commercial speech . . . is critical to this case." *United States v. Schiff*, 379 F.3d 621, 626 (9th Cir. 2004). The Ninth Circuit further acknowledged that Schiff argued that there exists one definition of "commercial speech" and that the Government and District Court suggest that there are two (2) separate and distinct definitions of commercial speech. *Id.*

The Ninth Circuit correctly noted that the definition of "commercial speech" asserted by Schiff is that commercial speech is limited to "advertising pure and simple." *United States v. Schiff*, 379 F.3d 621, 626 (9th Cir. 2004). The Ninth Circuit also noted, "The government agrees that commercial speech includes 'advertising pure and simple' but argues that the Supreme Court has defined it more broadly as 'expression related solely to the economic interests of the speaker and its audience.'" *Id.* (*citing Central Hudson*, 447 U.S. at 561).

The Ninth Circuit framed the issue in the case as follows, "If the disputed portions of *The Federal Mafia* are considered commercial speech, then the Central Hudson analysis would apply." *United States v. Schiff,* 379 F.3d 621, 626 (9th Cir. 2004). Further, the Ninth Circuit determined that if *The Federal Mafia* is considered "commercial speech" under *Central Hudson*, Schiff must lose his argument that the book cannot be censored or banned because, "[Schiff's] extensive history of litigation with the IRS leaves little doubt, not only that his theories are wrong, but that he knows they are wrong." *Id.*

Now, Schiff turns to the definition of "commercial speech." What is "commercial speech?" The Ninth Circuit has repeatedly explained that it has trouble defining what speech is, in fact, "commercial speech." For example, in *Schiff*, the Ninth Circuit wrote, "Commercial speech traditionally has been granted less protection than political speech and expressive speech. That much of First Amendment law is relatively settled. **What is less clear is what type of speech qualifies as commercial speech.**" *U.S. v. Schiff*, 379 F.3d 621, 626 (9th Cir. 2004) (Emphasis added). The Ninth Circuit had repeatedly noted in its opinions that the "boundary between commercial and noncommercial speech has yet to be clearly delineated." *Mattel v. MCA Records,* 296 F.3d 894, 906 (9th Cir. 2002) and *Hoffman v. Capital Cities/ABC, Inc.,* 255 F.3d 1180, 1184 (9th Cir. 2001).

Citing *American Academy of Pain Management v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004), Schiff argued to the Ninth Circuit Court of Appeals that speech is "commercial" if and only if **expression *related solely* to the economic interests of the speaker and its audience *and does no more than propose a commercial***

transaction. *See generally U.S. v. Schiff*, 379 F.3d 621, 626 (9th Cir. 2004). The Ninth Circuit acknowledged that it needed to resolve the difference of opinion between Schiff and the Government concerning the definition of "commercial speech," but in doing so it did not address its holding in *American Academy of Pain Management* in the *Schiff* opinion, *U.S. v. Schiff*, 379 F.3d 621 (9th Cir. 2004), nor did it undertake an analysis of the Supreme Court's decision in *Central Hudson*. Instead, the Ninth Circuit reviewed two (2) other Ninth Circuit cases involving intellectual property rights. The Court reviewed *Mattel v. MCA Records,* 296 F.3d 894 (9th Cir. 2002) and *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001). In these cases, the Court held that the use of pre-existing images and ideas to create a new expressive work that had commercial aspects "were primarily expressive, and, to the extent they included commercial aspects, the commercial speech was 'inextricably intertwined' with expressive speech and could not be enjoined." *Hoffman,* 255 F.3d at 1185. Thereafter, the Ninth Circuit differentiated the facts in *Schiff* from those in *Hoffman* and *Mattel*.

The Ninth Circuit's reliance on *Hoffman* and *Mattel* was misplaced because the issues are not similar. The proper consideration should have been the definition of "commercial speech" specifically, the issue is whether *The Federal Mafia* falls within the definition and is therefore subject to censorship and banning under the analysis articulated by the Supreme Court in *Central Hudson.*

Interestingly, the definition of "commercial speech" suggested by *Schiff* is the same definition articulated by the Ninth Circuit in both *Hoffman* and *Mattel.* In *Hoffman*, the Ninth Circuit wrote, "'Commercial speech' has special meaning in the First Amendment context. Although the

boundary between commercial and noncommercial speech has yet to be clearly delineated, the **'core notion of commercial speech' is that it 'does no more than propose a commercial transaction.'"** *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (Emphasis added). In *Mattel*, a case decided one (1) year later, the Ninth Circuit again wrote, "Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, the 'core notion of commercial speech' is that it 'does no more than propose a commercial transaction.'" *Mattel v. MCA Records*, 296 F.3d 894 (9th Cir. 2002) (citing *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001)).

The Ninth Circuit noted in *Hoffman*, "There are commonsense differences between speech that does no more than propose a commercial transaction and other varieties." *Hoffman*, 255 F.3d at 1185-86 (citations omitted). The Ninth Circuit was fully aware that *The Federal Mafia* did more than merely propose commercial transactions. The District Court acknowledged that the gist of *The Federal Mafia* is autobiographical, as opposed to commercial.

> *The Federal Mafia* is largely autobiographical, containing in large part Schiff's anti-tax and anti-government diatribes and theories. The book also contains Schiff's postulations about the voluntariness of income tax, and how federal income tax assessment is the true tax scam.

United States v. Schiff, 269 F. Supp. 2d 1262, 1267 (D. Nev. 2003).

Products and forms sold for the "unlawful avoidance" of paying taxes may be regulated or prohibited if not protected by the First Amendment, but the fact is that *The Federal Mafia* should not lose protection under the First Amendment merely because it may result in people further purchasing other products. *The Federal Mafia* must be analyzed as an entire book and on its own. *See Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 796, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988). *The Federal Mafia* was not created merely for the purpose of selling particular products and therefore cannot be defined as "commercial speech."

Whether *The Federal Mafia* attempts to convince readers of the propriety of Mr. Schiff's beliefs is not relevant under First Amendment analysis if *The Federal Mafia* itself is not merely "commercial speech." Commercial speech, as opposed to pure speech, fails to "editorialize on any subject, cultural, philosophical [or] report any particularly newsworthy fact, or to make generalized observations even about commercial matters." *See Virginia State Board Of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). *The Federal Mafia* does all of the above, and is therefore "pure speech."

Commercial speech does no more than "propose a commercial transaction." *Youngs Drug Products Corp.*, 463 U.S. 60, 66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983). "The 'idea' . . . communicate[d] is simply this: 'I will sell you . . . X . . . at the Y price.'" *See Virginia State Board of Pharmacy*, 425 U.S. at 761.

The fact that Mr. Schiff sells his book is insufficient to render it commercial speech. *Heffron v. International*

Society for Krishna Consciousness, 452 U.S. 640, 647, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). The fact that Mr. Schiff lists additional Reference Material (Books, Reports and Tapes) on pages 303-04 of his book does not render it "commercial speech." *See Village of Schaumburg v. Citizens for Better Environment,* 444 U.S. 620, 632 (1980). Mr. Schiff may have a profit motive, but that alone does not render his book commercial. Mr. Schiff's book provides important information concerning history, economic systems, monetary systems, judicial systems, politics and opinions. The Courts may deem his theories frivolous, but falsity alone is an insufficient basis to ban noncommercial expression. *New York Times v. Sullivan*, 376 U.S. 254, 271, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

Constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *New York Times v. Sullivan*, 376 U.S. 254, 271, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "Under the First Amendment there is no such thing as a false idea." *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Mr. Schiff's theories concerning taxes, whether or not consistent with the Government's position or court decisions, are protected speech. While some of Mr. Schiff's books tout a controversial interpretation or theory concerning taxation, it also makes clear that acting on them can and has landed people in jail.

The Ninth Circuit acknowledged that the District Court never considered *Hoffman v. Capital Cities/ABC, Inc.* or *Mattel v. MCA Records* in its analysis, but instead relied on cases involving similar issues. *U.S. v. Schiff*, 379 F.3d 621, 630 (9th Cir. 2004). Further, the Ninth Circuit noted that the primary case relied upon by the District

Court was *United States v. Estate Planning Services*, 202 F.3d 1093 (9th Cir. 2000).

The Ninth Circuit wrote, "Schiff argues that *Estate Preservation Services* is of little help on the First Amendment issue because the book being enjoined in that case did not include political speech." *U.S. v. Schiff*, 379 F.3d 621, 629 (9th Cir. 2004) The Ninth Circuit correctly noted in *Schiff* that the defendants in the *Estate Planning* case did not make any claims that the manual did anything other than describe the Asset Preservation Trusts and the benefits of using them," but concluded that the distinction didn't matter, because the panel was "persuaded that *Estate Preservation Services* is applicable here because *The Federal Mafia* is acting as an advertisement for Schiff's full range of tax-avoidance products and services." *Id.* This comment actually *begs the question. The Federal Mafia* is either a book entitled to the full protection of the Constitution or it is merely an advertisement. Unlike Mr. Schiff's book, Estate Preservation Services ATP Manual did not have independent significance outside the marketing and sale of the trusts, which EPS's officers admit was a tax shelter plan that they organized and sold, as defined by I.R.C. 6700. *Estate Preservation Services*, 202 F.3d at 1098. In other words, the ATP Manual wasn't worth the paper that it was written on without the related trust products. Contrary to ATP Manual, *The Federal Mafia* has independent significance apart from Mr. Schiff's other books, tapes, or lectures.

Finally, the Injunction issued by the District Court enjoined Schiff from selling the alleged "commercial" products that the Government claims *The Federal Mafia* references. *United States v. Schiff*, 269 F. Supp. 2d 1262, 1284-86 (D. Nev. 2003). If the products and services are no

longer available for sale as a result of the Injunction, then *The Federal Mafia* cannot be said to be "commercial speech" because the alleged "commercial" products which created the issue of "commercial speech" within the book are no longer available.

CONCLUSION

Irwin Schiff respectfully requests that the Supreme Court of the United States grant a writ of certiorari to enable the Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. IRWIN A. SCHIFF; CYNTHIA NEUN; LAWRENCE N. COHEN, aka Larry Cohen, individually, and all doing business as FREEDOM BOOKS, www.livetaxfree.com, www.paynoincome.com and www.ischiff.com, *Defendants-Appellants.*	No. 03-16319 D.C. No. CV-03-00281-LDG OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
February 10, 2004 – San Francisco, California

Filed August 9, 2004

Before: Procter Hug, Jr., Arthur L. Alarcón,
and William A. Fletcher, Circuit Judges.

Opinion by Judge Hug

COUNSEL

Michael D. Stein, Las Vegas, Nevada, for the appellants.

Judith A. Hagley, U.S. Department of Justice, Washington, D.C., for the appellee.

Allen Lichtenstein, ACLU of Nevada, for the amici.

OPINION

HUG, Circuit Judge:

Appellants Irwin Schiff, Lawrence Cohen, and Cynthia Nuen contest the constitutionality of a preliminary injunction entered by the District of Nevada enjoining them from promoting their "zero-income" tax theories. Specifically they argue (1) that the injunction is overbroad as it relates to a book they sell, *The Federal Mafia*, (2) that the requirement that they give the government their customer list violates both their own and their customers' First Amendment and Fourteenth Amendment associational rights, and (3) that the order that they place a copy of the injunction on their websites constitutes illegal compelled speech in violation of the First Amendment. We have jurisdiction pursuant to 28 U.S.C. § 1292(a). Because we agree that the government has shown a likelihood of success on the merits and that the provisions of the injunction do not violate the appellant's rights, we affirm.

I. Background

Irwin Schiff has a long history of opposition to the federal income tax laws.[1] For over thirty years he has maintained that the federal income tax is voluntary, although he has never been successful with that theory in court. With co-defendant Cynthia Nuen, he now operates Freedom Books in Las Vegas, Nevada. Co-defendant Lawrence Cohen is an employee at Freedom Books. Both

[1] *See, e.g., Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990); *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986); *Newman v. Schiff*, 778 F.2d 460 (8th Cir. 1985); *Schiff v. Commissioner*, 751 F.2d 116 (2d Cir. 1984); *United States v. Schiff*, 647 F.2d 163 (2d Cir. 1981).

through the bookstore and through three internet websites,[2] the defendants sell various tax packages that purport to teach the buyer how to "legally" stop paying federal income taxes. The book at issue in this injunction, *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*, is sold individually and as part of tax-avoidance packages.

The United States brought this civil action against the defendants in March 2003 pursuant to 26 U.S.C. § 7408, which authorizes a district court to enjoin any person from conducting activities that are subject to penalty under 26 U.S.C. §§ 6700 and 6701. These sections penalize individuals who organize, market, or promote tax evasion schemes. The district court granted a temporary restraining order, prohibiting the defendants from continuing with their business, and then, after a hearing, issued a preliminary injunction against the defendants on June 16, 2003. The defendants timely appealed the order. On September 3, 2003, a motions panel from this court stayed the order pending the outcome of this appeal.

The preliminary injunction provides in relevant part that the defendants may not engage in any of the following activities:

> (1) Organizing, promoting, marketing or selling, or assisting in organizing, promoting, marketing or selling, any plan or arrangement which advises or encourages taxpayers to attempt to violate internal revenue laws or unlawfully evade the assessment or collection of their

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[2] *See* www.livetaxfree.com, www.paynoincometax.com, and www.ischiff.com.

federal tax liabilities, including those that promote, sell, or advocate the use of the "zero income" tax return, and the use of false withholding forms;

(2) Engaging in conduct subject to penalty under 26 U.S.C. § 6700, including organizing or selling a plan or arrangement and making or furnishing a statement regarding the excludability of income that they know or have reason to know is false or fraudulent as to any material matter;

(3) Engaging in conduct subject to penalty under 26 U.S.C. § 6700, including organizing or selling a plan or arrangement and making or furnishing a statement regarding the excludability of income that they know or have reason to know is false or fraudulent as to any material matter;

(4) Advertising, marketing or promoting any false, misleading, or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes, including the positions that (1) persons can legally stop paying taxes or become tax free by using the plan or arrangement; (2) federal income tax is voluntary; (3) there is no law requiring anyone to pay income tax; (4) there is no income tax, only a profits tax; (5) it is legal to report zero income regardless of what you may have earned, or to use false withholding forms; (6) Schiff's personal services as witness or brief writer will be materially helpful in defending criminal prosecution; or any other false, misleading, or deceptive tax position;

(5) Assisting others to violate the tax laws, including the evasion of assessment or payment of taxes;

(6) Inciting others to violate the tax laws, including evasion of assessment and payment of taxes;

(7) Instructing or assisting others to hinder or disrupt the enforcement of internal revenue laws by filing frivolous lawsuits, taking frivolous positions in an effort to impede IRS audits and Collection Due Process Hearings, or engaging in other conduct intended to interfere with the administration and enforcement of the internal revenue laws;

(8) Preparing or assisting in the preparation of any federal income tax return for any other person;

(9) Engaging in conduct subject to penalty under 26 U.S.C. § 6694 (preparing any part of a return or claim for refund that includes an unrealistic position);

(10) Engaging in any conduct subject to penalty under 26 U.S.C. § 6695 (failing to sign and furnish the correct identifying number on tax returns they prepare); or

(11) Engaging in any other activity subject to injunction or penalty under 26 U.S.C. §§ 7407, 6694, or 6695, including fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws.

The preliminary injunction also requires the defendants to submit to the government a list of their customers

from January 1, 1999, through the present, including names, addresses, phone numbers, email addresses, and social security or employee identification numbers. Finally, the defendants are required to post a copy of the preliminary injunction order on the "Home" pages of the websites through which they conducted their business.

On appeal the defendants argue that the preliminary injunction violates their First Amendment rights because (1) it is overbroad as it relates to *The Federal Mafia*, (2) the forced disclosure of the customer list violates their own and their customers' associational rights, and (3) the placement of the order on their websites constitutes unconstitutional compelled speech.

II. Discussion

A. Standard of Review

This court reviews a district court's grant of a preliminary injunction for abuse of discretion. *United States v. Estate Preservation Servs.*, 202 F.3d 1093, 1097 (9th Cir.2000). The scope of a preliminary injunction is also reviewed for abuse of discretion. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 823 (9th Cir. 2002). A trial court abuses its discretion if it bases its decision on "an erroneous legal standard or on clearly erroneous factual findings." *Estate Preservation Services*, 202 F.3d at 1097.

B. Granting the Preliminary Injunction

A preliminary injunction may be granted when the plaintiffs demonstrate "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised

and the balance of hardships tips sharply in [their] favor." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 917-18 (9th Cir. 2003) (en banc) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

Courts use a specialized standard when reviewing preliminary injunctions issued pursuant to 26 U.S.C. § 7408. *See Estate Preservation Servs.*, 202 F.3d at 1105; *United States v. Kaun*, 827 F.2d 1144, 1148 (7th Cir. 1987); *United States v. Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985); *SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982). The district court must evaluate the likelihood of future § 6700 violations, and thereby determine whether an injunction is needed. *Estate Preservation Servs.*, 202 F.3d at 1105. Factors that the court may consider when making this determination include the following: "(1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation, (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's recognition (or non-recognition) of his own culpability; and (6) the likelihood that the defendant's occupation would place him in a position where future violations could be anticipated." *Id.*

Given Schiff's extensive history of tax avoidance and the fact that the defendants operate a bookstore devoted to introducing others to his tax avoidance schemes, there is a strong likelihood that the defendants would violate § 6700 in the future. Therefore, the district court did not abuse its discretion when it granted the preliminary injunction.

C. The Scope of the Preliminary Injunction

The defendants argue that the injunction, even if appropriately granted, should be struck down because it violates their constitutional rights. They argue that the scope of the preliminary injunction is unconstitutionally broad as it relates to *The Federal Mafia*. They also argue that the injunction unconstitutionally compels them to speak and infringes on their rights to expressive association.

1. *The Federal Mafia*

The law on prior restraints is well-developed. There are three theories by which the sale and publication of *The Federal Mafia* can be enjoined. First, pure commercial speech can be enjoined to the extent that it is fraudulent. *Central Hudson Gas & Electric v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). Second, speech that will incite imminent lawlessness may be barred. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Finally, speech that aids or abets criminal activity can be prohibited. *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612-13 (2003).

a. Commercial Speech

Commercial speech traditionally has been granted less protection than political speech and expressive speech. *Central Hudson*, 447 U.S. at 562-63. That much of First Amendment law is relatively settled. What is less clear is what type of speech qualifies as commercial speech. The definition of commercial speech, however, is critical to this case. If the disputed portions of *The Federal Mafia* are considered commercial speech, then the *Central*

Hudson analysis would apply. Under the first prong of *Central Hudson*, if commercial speech is misleading or related to unlawful activity, the government may regulate it or ban it entirely. *Id.* at 563-64. Schiff would lose on this prong of the *Central Hudson* test because his extensive history of litigation with the IRS leaves little doubt, not only that his theories are wrong, but that he knows they are wrong. Because the government has the right to regulate false, misleading or deceptive commercial speech, *Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002), the injunction on these materials would be appropriate. On the other hand, if the disputed portions of the book are considered political speech they would be entitled to a much higher standard of protection.

A discussion of the two definitions of commercial speech offered by the parties will be helpful here. Schiff maintains that commercial speech is limited to "advertising pure and simple." Appellant's Brief at 16-19; *see also Central Hudson*, 447 U.S. at 562. Under this narrow definition, only the back cover, pages 303-04, and the inserts, which all advertise other products available from Schiff, would qualify as commercial speech that can be regulated by the government. The government agrees that commercial speech includes "advertising pure and simple" but argues that the Supreme Court has defined it more broadly as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. Although neither the government nor the district court, which adopted the government's definition of commercial speech, specifically states which pages would meet this broad definition of commercial speech, it can be assumed the government believes that, at least, Chapter Eight ("How to Stop Paying Income Taxes") and

the Epilogue and Addendum to the Second Edition (which give instructions on how to file the "zero-income" returns and samples of such returns) would qualify as commercial speech under this definition.

To resolve the difference of opinion between Schiff and the government, it is necessary to interpret what the Supreme Court meant in *Central Hudson* when it offered both of these phrases as definitions of commercial speech. Much thought has gone into the question of what the Supreme Court really meant by the "second" category of commercial speech, upon which the government relies.[3] In this court's most recent commercial speech cases we have been forced to examine speech that blurs the line between commercial and expressive. *See Mattel, Inc. v. MCA Records, Inc.* 296 F.3d 894 (9th Cir. 2002); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). The case before us is not so close. In both *Mattel* and *Hoffman* the speaker used pre-existing images and ideas to create a new expressive work that had commercial aspects.[4] In the ensuing intellectual property challenges,

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[3] *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); *Zauderer v. Supreme Court of Ohio*, 471 U.S. 626, 637 (1985); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir. 1998); *Mitchell N. Berman, Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"*, 55 VAND. L. REV. 693 (2002); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293 (1993).

[4] In *Mattel*, a European pop group created the song "Barbie Girl" that parodied America's "plastic" culture. *Mattel*, 296 F.3d at 899. In *Hoffman* a magazine digitally altered images from famous movies, including an image of Dustin Hoffman in *Tootsie*, to showcase spring fashions. *Hoffman*, 255 F.3d at 1183.

we held that the new works were primarily expressive, and, to the extent they included commercial aspects, the commercial speech was "inextricably entwined" with the expressive speech and could not be enjoined. *Hoffman*, 255 F.3d at 1185.

The case at hand is markedly different. Instead of using an iconic figure of Americana to lampoon American culture, Schiff has created an entire line of tax avoidance products and services, of which *The Federal Mafia* is the linchpin. *Compare Mattel*, 296 F.3d 894. The extravagant claims made in *The Federal Mafia* are designed to convince readers that they can lawfully avoid paying their income taxes so that the readers will buy other products in Schiff's line. The insert "From the Desk of Irwin Schiff" makes it plain that this book is the "legal" foundation upon which taxpayers can rely in following the various suggestions that he makes both in the book and elsewhere in his tapes and seminars. For example, at the bottom of that page in the last paragraph he states: "Prior editions contain no information that suggested that persons filing 'zero' income tax returns should get a refund of all the 'income' taxes they paid that year. The return shown on page 274 has been changed to reflect this information." On the inside of the fly leaf of the book it says,

> Did you know, for example, that **income taxes have to be assessed just like property taxes?** And, if you do not file an income tax return, there is no lawful way the government can assess you . . . Did you know that no law says you have to pay income taxes or that you can be 'liable' for such tax. . . . Are you aware that there are no criminal statutes that apply to income taxes?

(Emphasis in the original).

All of these things under discussion within the book are made to assure the taxpayer that the taxpayer can legitimately follow these suggestions and forms. The other insert in the book entitled, "Irwin Schiff's Freedom Books," also makes it plain that this is intended to help sell his other products. For example, on the back of the second page he shows the price for all of the various tapes and books and so forth, the videos that he is selling, and shows the entire "Freedom Package" at $1060. Then he shows on the next page the "Schiff's Specials" where you can get the Freedom Package for less and various other books and tapes for better prices. The government argues, and we are persuaded, that *The Federal Mafia* is an integral part of Schiff's whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax.

The declaration of Barbara Cantrell in the court record attaches many documents obtained from the defendant's website, www.paynoincometax.com. The following are illustrative of the integral part *The Federal Mafia* plays in Schiff's whole financial program:

> There are over a million people using Irwin Schiff's materials, research and applications, to set themselves free from the "income tax" scam.
>
> * * *
>
> We all get started with the book, "The Federal Mafia".
>
> It's good for you to also get a Seminar, either live, cassette, or on video. This is your "class".
>
> The Seminars come with updated documents and exhibits that are not found in the book, so they

can help to update your "Federal Mafia", and they are great study tools.

If you like to read, join the many people who do this with just "The Federal Mafia". It shows you how to file the zero return, stop your wage withholding, and explains the basics.

After you file the zero return, you'll want to get the Schiff Reports, Series 5 and Series 6. These hold all of the latest research and applications, and they include a response letter for every letter the IRS sends out.

Also the Schiff Report Series tapes cover State income tax returns and amended returns if you are considering going back 3 years on claims for refunds. You'll enjoy this very much!

A good "starter kit" is "The Truck Driver's Special". It includes the "Federal Mafia", the "5 1/2 Hour Cassette Seminar", and the "Tax Rebel's Guide to the Constitution", and sells for $80.

Or, you may want the "Secrets Combo", which includes the "Video Seminar" with the "Federal Mafia", for $175.

Transcript Record at 0062.

The Federal Mafia, Irwin Schiff's latest book explains the procedures used by thousands to legally stop paying income taxes.

It provides the information and documents required to immediately stop your wage withholding, and to file a request for a *refund* of all the taxes you paid.

$38.

Transcript Record at 0018.

> His current book "The Federal Mafia" shows you:
>
> 1. How you can immediately stop having your income taxes taken from your pay;
> 2. How to get back every dime you paid in income taxes this year;
> 3. How to stop IRS agents from seizing your property . . . a power no IRS agent possesses;
> 4. How to break "offer and compromise" agreement you might have with the IRS, since these agreements were entered into on the basis of fraud and intimidation.
>
> Get Irwin Schiff's books and tapes and start enjoying life, with more money to spend and with the IRS off your back and out of your life.

Transcript Record at 0043.

Unlike *Hoffman* and *Mattel*, the expressive and political portions of *The Federal Mafia* are not "inextricably entwined" with its commercial elements. Schiff can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products. Because the protected and unprotected parts of the book are not inextricably intertwined, Schiff cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudulent commercial speech into full First Amendment protection.

The district court did not address *Mattel* or *Hoffman* in its analysis. Instead, it relied on several factually similar cases to support its conclusion that *The Federal Mafia* is commercial speech and can therefore be enjoined.

The primary case on which the district court relied is *Estate Preservation Services*.[5] In that case, this court upheld an injunction imposed for violations of 26 U.S.C. § 6700, the same statute at issue in this case. The defendants had been marketing various trusts that were designed to lower their clients' tax burdens, and they admitted to making several misrepresentations to their clients about the permissibility of their tax schemes. *Estate Preservation Services*, 202 F.3d at 1097-98.

Schiff argues that *Estate Preservation Services* is of little help on the First Amendment issue because the book being enjoined in that case did not include political speech. The book enjoined in *Estate Preservation Services*, "Asset Preservation Trusts (APT) – Description, Use & Benefits," was an instruction manual for tax evasion. The defendants in that case did not make any claims that the manual did anything other than describe the Asset Preservation Trusts and the benefits of using them. Nonetheless we are persuaded that *Estate Preservation Services* is applicable here because *The Federal Mafia* is acting as an advertisement for Schiff's full range of tax-avoidance products and services. As such, to the extent that *The Federal Mafia*

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[5] *Estate Preservation Services* relies on and is part of a long series of cases upholding injunctions of fraudulent tax schemes. *See, e.g., United States v. Raymond*, 228 F.3d 804 (7th Cir. 2000) (enjoining defendants from promoting their "de-taxing" system); *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) (enjoining the leader of a tax protester group from promoting his tax shelters and helping his followers fill out returns he knew to be false); *United States v. Buttorff*, 761 F.2d 1056 (5th Cir. 1985) (enjoining defendants from advocating the benefits of "pure equity trusts"); *United States v. White*, 769 F.2d 511 (8th Cir. 1985) (enjoining defendants, Minnesota Society for Educated Citizens, from selling information on how to evade income taxes).

constitutes advertising, the district court did not abuse its discretion when it granted the preliminary injunction enjoining publication of *The Federal Mafia* in its present form.

Fraudulent commercial speech may be enjoined. *Madigan*, 538 U.S. 600. An advertisement is fraudulent when it misleads customers about the benefit of the offered product. In *Madigan*, the defendants, a for-profit fundraising company, fraudulently told their customers that "a significant amount" of each dollar donated would be put toward Vietnam veterans benefits when in fact only fifteen cents on the dollar would be put toward the charity. *Id.* at 606-09. In this case, Schiff is making similarly fraudulent claims. For example, on the inside cover of *The Federal Mafia*, he informs readers that "no law requires you to file income tax returns or pay this tax." On the same page he further claims that "there are no criminal statutes that apply to income taxes . . . [a]nd there is no law giving federal courts authorization . . . to prosecute anyone for income tax 'crimes'." Although these claims are far-fetched, they could mislead a customer into believing that he or she could use Schiff's products to legally stop paying income taxes. Given the risk of consumer confusion, the district court did not abuse its discretion when it enjoined *The Federal Mafia*. The government has established that it has a high probability of success on the merits, and we are persuaded that the balance of the hardships tips in favor of the members of the public who could be misled by *The Federal Mafia* and the defendants' associated products.

Because we can uphold the injunction as an appropriate restriction on fraudulent commercial speech, we do not need to address the alternate bases cited by the district

court to support the injunction, inciting imminent lawless behavior and aiding and abetting criminal activity.

2. Disclosure of Customer Lists

The appellants argue that the provision requiring them to disclose their customer lists to the government is a violation of both their own and their customers' First Amendment and Fourteenth Amendment associational rights. This issue was not raised in the district court. The constitutionality of the order to disclose the customer list is solely a legal question. As such, the decision of whether to consider the issue is a discretionary one. *See United States v. Echavarria-Escobar*, 270 F.3d 1265, 1267-68 (9th Cir. 2001). Because this issue was not raised in or addressed by the district court we decline to exercise our discretion to consider it at this stage. The proceedings for a permanent injunction are pending in the district court. The defendants will have an opportunity to request a stay of this portion of the injunction to allow the district court to consider this issue.

3. Posting Injunction on the Websites

The appellants argue that the district court's order that a copy of the preliminary injunction be placed on their websites violates their First Amendment rights by forcing them to promote an ideological position with which they do not agree. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 580 (1995). Based on their position in this litigation, there can be no doubt that the defendants do not agree with the position espoused in the preliminary injunction, but there is a difference between the case at hand and *Hurley*, or even more

commercial cases such as *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (holding that cable operators are engaging in protected First Amendment expression when they decide which stations to carry).

The defendants have been selling products that help their customers to engage in illegal activity. Posting the preliminary injunction on the website would bring the fact that these tax schemes are illegal to their potential customers' attention. This court has held that mandated disclosure of factual, commercial information does not offend the First Amendment. *Envtl. Def. Ctr., Inc. v. United States EPA*, 344 F.3d 832, 849-51 (2003). Moreover, as the government notes, courts routinely require similar disclosures in regulated fields.[6]

In a commercial setting, such as a website that sells products, the government must be able to regulate content to prevent the deception of customers. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985). Because the defendants are selling a product that, if used, could expose their customers to criminal liability for tax evasion, the government does not offend the First Amendment when it requires the defendants to post the preliminary injunction on the websites where the product is sold, warning potential customers of the hazards of the product.

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[6] *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993); *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 165 (3d Cir. 2001); *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000).

III. Conclusion

We conclude that neither the district court's decision to grant the preliminary injunction nor the scope of the preliminary injunction abuses the district court's discretion. We therefore AFFIRM.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. IRWIN SCHIFF, CYNTHIA NEUN, LAWRENCE N. COHEN aka LARRY COHEN, individually and doing business as FREEDOM BOOKS, www.livetaxfree.com, www.paynoincometax.com and www.ischiff.com. Defendants.	CV-S-03-0281-LDG (RJJ) **ORDER** (Filed June 16, 2003)

The United States has filed a motion for a preliminary injunction against defendants pursuant to 26 U.S.C. §§ 7402, 7407 and 7408. According to the complaint, defendants doing business as Freedom Books are promoting through consulting services, websites, and tax-scam packages the filing of "zero-income" federal income tax returns, and directing their customers to inundate the IRS, federal courts and Department of Justice with frivolous lawsuits and IRS hearings. The complaint alleges that defendants recruit customers to the zero-income tax return scheme by falsely stating that income earned by individuals is not subject to federal income taxes. Defendants then advise customers to file zero-income tax returns; assist customers to submit false W-4 forms to stop withholding taxes from wages; and help customers prepare other fraudulent tax documents.

After a noticed hearing, the court on March 19, 2003, issued a temporary restraining order (#13) which enjoined defendants from engaging in activity subject to penalty under 26 U.S.C. § 6700 (promoting abusive tax shelters), § 6701 (aiding and abetting understatement of tax liability), § 6694 (preparing any part of a return or claim for refund that includes an unrealistic position); § 6695 (failing to sign and furnish the correct identifying number on tax returns that they prepare), and engaging in other fraudulent or deceptive conduct that substantially interferes with the proper administration of the IRS Code. The activities proscribed by the restraining order include the sale and distribution of the book *The Federal Mafia* and other books, videotapes, seminars, packages, and consultations that provide instructions on how to file or submit false or fraudulent returns and tax forms.

A preliminary injunction hearing was conducted on April 11, 2003. Following the hearing, the court ordered post-hearing briefs be filed by May 1, 2003, and allowed reply briefs to be filed on or before May 12, 2003. Upon consideration of the evidence and arguments, the court makes the following determinations, which shall be construed as findings of fact and conclusions of law.

I. Jurisdiction

Title 26 U.S.C. section 7408 authorizes an action to enjoin promoters of abusive tax shelters "from further engaging in conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 (relating to penalties for aiding and abetting understatement of tax liability)." 26 U.S.C.

§ 7408(a).[1] Section 7408 requires a finding that the person has engaged in the conduct subject to penalty under §§ 6700 or 6701, and that injunctive relief is appropriate to prevent recurrence of such conduct.

Section 6700(a) authorizes the imposition of a penalty on any person who:

> (1) (A) organizes (or assists in the organization of) –
>
> (i) a partnership or other entity,
>
> (ii) any investment plan or arrangement, or
>
> (iii) any other plan or arrangement, or
>
> (B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and
>
> (2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale) –
>
> (A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has

[1] Defendants argue that the § 7408 language authorizing injunctions against persons who "further engage in conduct subject to penalty," must be read to require the government to have imposed a penalty before an injunction would be authorized. A plain reading of the statute, however, requires only that an individual be engaging in activity "subject to penalty." Because defendants offer no case law in support, their argument must be rejected.

> reason to know is false or fraudulent as to any material matter, or
>
> (B) a gross valuation overstatement as to any material matter . . . .

Title 26 U.S.C. section 7407 authorizes a court to enjoin a person from acting as an income tax return preparer if that person has repeatedly (1) engaged in conduct subject to penalty under § 6694 (which prohibits the preparation or submission of a return containing an unrealistic position), or § 6695 (which mandates that a return preparer sign returns and include his identifying number); (2) misrepresented his eligibility to practice before the IRS, or otherwise misrepresented his experience or education as a return preparer, or (3) engaged in any other fraudulent or deceptive conduct substantially interfering with the proper administration of the tax laws. Title 26 U.S.C. section 7402(a) authorizes district courts to issue injunctions "as may be necessary or appropriate for the enforcement of the internal revenue laws."

The government bears the burden of proving each element necessary for the issuance of an injunction by a preponderance of the evidence. *United States v. Estate Preservation Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000). Because § 7408 expressly authorizes the issuance of an injunction, the traditional requirements for equitable relief need not be satisfied. *Id.*

II. Violations of § 6700

To establish a violation of § 6700 (promoting abusive tax shelters), warranting an injunction under § 7408, the United States must show that:

(1) the defendants organized or sold, or participated in the organization or sale of an entity, plan, or arrangement;

(2) they made or caused to be made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement;

(3) they know or had reason to know that the statements were false or fraudulent;

(4) the false or fraudulent statements pertained to a material matter; and

(5) an injunction is necessary to prevent recurrence of this conduct.

Estate Preservation, 202 F.3d at 1093. Here, the government has proved these elements as to each of the individual defendants.

A. Organization, sale and participation in organization or sale of plan or arrangement

The government's documentation in support of its motion for a preliminary injunction shows that defendants have organized or sold, or participated in the organization or sale of a plan or arrangement which assists customers to file or submit false federal income tax returns and W-2 forms.[2] Defendant Schiff sells books, tapes and other

[2] Defendants argue that their witnesses testified that it was "their own independent research (initially triggered by the book) that led them to the belief [in Schiff's theories]," and therefore, what they purchased from Schiff was not a tax shelter, but information to "lead them to the law." Such a pseudo-psychological dissection of what motivates Schiff's customers to adopt his scheme is untenable. Schiff's customers' personal substantiation of Schiff's theories does not negate the influence of the scheme on their actions. As discussed later, the

(Continued on following page)

products over the internet and through Freedom Books, his store in Las Vegas, Nevada, and other avenues, with the purpose of advising purchasers about how to "legally stop paying taxes." Cantrell Decl., attachment at 003 (hereafter "Cantrell"). These products and packages of products are advertised from between $10 to over $1600. Schiff also markets seminars and workshops to instruct attendees on how to stop paying taxes at $150 per person/ $200 per couple. Cantrell, at 016. Schiff also offers $50 letter-writing services and "personal consults" for $300 per hour. Schiff's organization promises to "guide you in selecting the materials you need to be Income Tax Free!" Cantrell, at 003.

Schiff's operation is based on the premise that "the income tax is voluntary," and cites a variety of statements and information to that effect. Cantrell, at 005-014. Not surprisingly, many of these statements and information are taken out of context, and none of them carries the weight of legal precedent on the legitimacy of the tax positions Schiff takes. The plan then introduces customers to Schiff's zero-income tax scheme. Cantrell, at 002, 040-042. Pursuant to the scheme, Schiff advises his customers that "[f]or income tax purposes, you can legally report 'zero' income and pay no income taxes regardless of how much you might have earned." Cantrell, at 003. Schiff justifies this claim by asserting that there is "no law requiring anyone to pay income tax." Cantrell, at 002.

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government presented evidence of, and Schiff's own witness testified to, the use of the exact materials provided in Schiff's publications. No one could independently arrive, without deviation, at the exact same theories, and create the identical materials contained in Schiff's scheme.

Rather, Schiff takes the position that the Constitution limits Congress' power to tax only "corporate profits." According to Schiff, "[f]or tax purposes, 'income' only means corporate 'profit.' Therefore, no individual receives anything that is reportable as 'income.' In essence we have a profits tax, not an income tax." Cantrell, at 060.

Central to Schiff's zero-income scheme is the book he authored entitled *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes* (hereafter *The Federal Mafia*). Schiff identifies *The Federal Mafia* as the starting point of his program, and states that "[i]t shows you how to file the zero return, stop your wage withholding, and explains the basics." Cantrell, at 062. Schiff also advertises his program and services on the internet through testimonials, some of which identify only *The Federal Mafia* as the resource for avoiding paying taxes. *See* Cantrell, at 029, 030, 031, and 035-036. *The Federal Mafia* is priced at $38, and is promoted throughout Schiff's online marketing of his seminars and materials. Advertising for the book states that it "provides the information and documents required to immediately stop your wage withholding, and to file a request for a refund of all the taxes you paid." Cantrell, at 018. *The Federal Mafia* also features prominently in each of Schiff's instructional packages separately priced at $80, $175, $250, $295, $795, and $1060.

The Federal Mafia is largely autobiographical, containing in large part Schiff's anti-tax and anti-government diatribes and theories. The book also contains Schiff's postulations about the voluntariness of income tax, and how federal income tax assessment is the true tax scam. *The Federal Mafia* also touts Schiff as a "tax consultant," and references his background in accounting, economics,

actuarial science and law as qualifications for his services. *The Federal Mafia*, back cover.

True to its promise, *The Federal Mafia* contains specific instructions on how to stop employers from withholding taxes by submitting an "exempt" W-4, and how to file "zero income" tax returns. *See The Federal Mafia*, at 154-68, 244-45, 274-75. Schiff's promotional materials include a sample "Zero Return" and advise that it be filed "only by attaching to it our two-page attachment." Cantrell, at 040. *The Federal Mafia* includes a one page attachment to be filed with the "Zero Return." *See The Federal Mafia*, at 275. At the bottom of the page is the following "important" notice:

> This attachment has now been expanded to two pages and includes vital issues not fully developed in The Federal Mafia. The new attachment cites 17 court decisions, 13 statutes, and numerous other official sources to establish your claim that you had "zero" income and are entitled to a full refund of all the taxes you paid for that year – a claim not previously developed in this book. The new, expanded attachment is automatically included when The Federal Mafia is ordered from Freedom Books. If you purchased this book in a bookstore, send us your sales slip and a stamped, self-addressed envelope, and we will send you the new attachment at no charge

The Federal Mafia, at 275. Thus, the two-page attachment updates the existing attachment in the book at no additional charge.

The Internal Revenue Service has identified nearly 5,000 zero-income federal income tax returns filed by some 3,100 customers of Schiff's organization during the past three years using Schiff's two-page attachment referenced

in *The Federal Mafia*, supplied with its purchase, and identified by promotional materials as a requirement to the filing of the zero-income tax return tutored by *The Federal Mafia* and other of Schiff's instructional services. Henline Decl.(hereafter "Henline"), at para. 14. In addition to that documentary evidence, during the preliminary injunction hearing, Schiff's witness Robert Wesley testified that he obtained the zero-income return that he filed from *The Federal Mafia*. The IRS estimated that these filings represented $56 million in attempted tax evasion. Henline, at para. 17.

Defendant Neun sells Schiff's tax materials, promotes Schiff's packages, and charges a fee to appear with customers at IRS audits and IRS appeals hearings as a "witness." Cantrell, at 066, 087-88, and 093. Neun also has prepared Schiff's zero-income federal tax returns for 1998 through 2001. Henline, Exhibits 3-6.

Defendant Cohen sells Schiff's materials and promotes Schiff's packages and seminars through Freedom Books. *See* Holland Decl., Exhibits 1 and 2. Cohen has also prepared zero-income tax returns based on Schiff's tax-scheme materials. *Id.*

B. <u>False and fraudulent nature of statements and defendants' knowledge</u>

Schiff's contention that the imposition of a validly enacted income tax by Congress violates the taxing clauses of the Constitution has been rejected repeatedly by the Supreme Court and the Ninth Circuit Court of Appeals. *See United States v. Sullivan*, 274 U.S. 259, 263-264 (1927) (defendant's income subject to tax); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 19-20 (1916) (the right of Congress to

impose income tax cannot be doubted); *Tyee Realty Co. v. Anderson*, 240 U.S. 115, 117-18 (1916) (income tax constitutional); *United States v. Nelson (In re Becraft)*, 885 F.2d 547, 548-49 (9th Cir.1989) (imposing sanctions on counsel in criminal appeal for challenging constitutionality of tax codes, holding such challenges "patent[ly] absurd[]" and frivolous when "the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's authorization of a non-apportioned direct income tax on United States citizens residing in the United States and thus the validity of the federal income tax laws as applied to such citizens"); *Grimes v. Comm'r*, 806 F.2d 1451, 1453 (9th Cir.1986) ("There can be no doubt that the tax on income is constitutional.").

Furthermore, Schiff's claim that paying taxes is voluntary is knowingly false. Schiff, above all, is aware that citizens have a legally enforceable obligation to pay federal income taxes. In 1978, Schiff was convicted of failure to file personal income tax returns for 1974 and 1975. On appeal, Schiff did not challenge the fact that he was required to file a return showing his income; rather he successfully claimed that admission of a videotape of a television talk show was unduly prejudicial to his good faith defense. *See United States v. Schiff*, 612 F.2d 73 (2d Cir. 1979). A subsequent conviction for failure to file personal income tax returns for 1974 and 1975 was affirmed without opinion in 1981. *See United States v. Schiff*, 647 F.2d 163 (2d Cir. 1981). Schiff's 1985 conviction for attempted tax evasion and willful failure to file a corporate tax return was affirmed by *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, 480 U.S. 495 (1987). The first three counts of the indictment

against Schiff in his 1985 conviction charged that he had "knowingly attempt[ed] to evade and defeat" the income tax owed by him for each of the three years in question by failing to make tax returns, failing to pay the income tax he owed and concealing and attempting to conceal his income." *Id.* at 109. "Schiff's defense at trial was that he believed in good faith that *the income tax was voluntary*, and that he was, therefore, not required to pay the tax." *Id.* at 110 (emphasis added). In its opinion affirming Schiff's conviction, the Court of Appeals admonished:

> It is well established that the good faith defense encompasses misunderstanding of the law, not disagreement with the law. The distinction is necessary to the function of the tax system. Without it, any taxpayer could evade tax obligations simply by stubbornly refusing to admit error despite the receipt of any number of authoritative statements of the law. At some point, such stubbornness becomes unreasonable; the line is crossed between misunderstanding and disagreement and the taxpayer can no longer successfully assert a defense of good faith.

Id. at 112 (citations omitted).

That Schiff has no misunderstanding of the falsity of the claim that income tax is voluntary is further evidenced by his many losses in civil tax cases. In *Schiff v. United States*, 919 F.2d 830 (2d Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991), the Second Circuit affirmed an appeal from a summary judgment against Schiff in a tax refund case, holding that "Schiff's background makes it inconceivable that he was unaware of his obligation to file returns and pay taxes." *Id.* at 833-34. In that same case, the Second Circuit described Schiff as "an extremist who reserve[s] the right to interpret the decisions of the Supreme Court

as he read[s] them from his layman's point of view regardless of and oblivious to the interpretations of the judiciary." *Id.* at 834. The Tax Court, too, has affirmed a fraud penalty and imposed a $25,000 fine on Schiff for offering specious arguments against federal income tax, including the argument that income taxation is not authorized by the taxing clauses of the United States Constitution. *Schiff v. Comm'r*, 63 T.C.M. (CCH) 2572 (1992).[3]

Furthermore, a number of individuals have been convicted of tax crimes after following Schiff's theories. *See United States v. Burdett*, 962 F.2d 228 (2d Cir. 1992) (affirming conviction of defendant who was convinced in part by Schiff's book entitled *How Anyone Can Stop Paying Taxes* that the filing of a tax return was voluntary, and that his wages were not taxable); *United States v. Payne*, 978 F.2d 1177 (10th Cir. 1992) (same), *cert. denied*, 508 U.S. 950 (1993); *United States v. Middleton*, 246 F.3d 825 (6th Cir. 2001) (affirming conviction of defendant who followed Schiff's teachings and concluded that he had no obligation to pay income tax); *United States v. Dentice*, 1999 WL 1038003 (9th Cir. 1999) (unpublished[4]) (rejecting good faith defense in part because defendant could not reasonably rely on Schiff, who was neither a CPA nor an attorney and had himself been convicted of tax evasion).

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[3] Indeed, Schiff's own counsel's refusal to assert Schiff's tax theories in the hearing on the motion for preliminary injunction should itself have sent a message to Schiff that his tax ideology is legally frivolous. After Schiff's counsel refused to assert Schiff's theories in court, Schiff dismissed her, and represented himself during the remainder of the hearing.

[4] This case is cited as evidence of Schiff's knowledge of the reception of his theories in the Ninth Circuit, rather than for the propositions stated in the case.

In *The Federal Mafia*, Schiff acknowledges in a footnote that some people persuaded by him to stop paying income taxes have gone to jail. *The Federal Mafia*, at 167 n.1. Schiff then warns that by using the information in his book (particularly the means for stopping the withholding of tax), the reader runs the risk of going to jail. Schiff's attempt at a disclaimer, along with the unanimous tide of cases adverse to the legal foundations of his programs, make clear that Schiff is on notice of the law, notwithstanding his remonstrations that he is the one who is right, and that every single legal authority to the contrary is either bogus or unsound.

Furthermore, Schiff's attempt to distinguish the adverse cases on the grounds that they do not specifically involve application of his zero-income tax scheme is totally unavailing. All of Schiff's schemes suffer from the same conceptual infirmities, rejected time and again by the courts: that income taxes are voluntary; that there is no legal obligation to pay income taxes; and that imposition of an income tax by Congress violates the taxing clauses of the Constitution. Only the approaches to avoiding the payment of income tax are different. Schiff cannot avoid the "know or had reason to know" standard by holding up a differently wrapped package. Schiff knows what's in the box, and therefore knows better. *See Estate Preservation*, 202 F.2d at 1103 ("The 'knew or had reason to know' standard therefore includes 'what a reasonable person in the [defendant's] ... subjective position would have discovered.'") (citations omitted).

If Schiff's knowing marketing of his tax scheme were not enough, he also falsely and perversely tries to allay his customers' reasonable fears of the civil or criminal consequences for following his tax advice. On Schiff's publicly

posted online bulletin board, a customer involved in legal proceedings expressed fear of the loss of her home and prison for following Schiff's counsel. Schiff responded that "[n]o one is going to prison or is even being charged criminally. . . . You need to be studying my material and finding a better confidence level. If you did that, you would not be so afraid!" Cantrell, at 072-074. The deceptive nature of Schiff's scheme is further illustrated by Schiff's suggestions in *The Federal Mafia* that customers cannot be successfully prosecuted for signing W-4 forms falsely claiming exempt status so long as the customers write "under duress" next to their signature on the form. *See The Federal Mafia*, at 158-59. In addition, Schiff markets in *The Federal Mafia* his availability as a witness and brief writer, suggesting falsely that these services will be material in defending a criminal prosecution. *See The Federal Mafia*, at 266.

The government has also established that defendant Neun directly participated in the organization and sale of the tax scheme, furnished false statements, and knew or had reason to know that the statements were false. Neun is Schiff's long-time business partner. She has advised individuals that "[t]he best reliance defense you can get is the attachment to your zero return," and stated that "[n]o one is going to prison or is even being charged criminally." Cantrell, at 066, 072. She endorses false testimonials on the successes of Schiff's zero-income program. Cantrell, at 21-25. And she has helped individuals fill out zero-income tax returns. Henline, at Exhibits 5, 6, 8, 9, 10, 11, 12, 13.

The government has also shown defendant Cohen's direct participation in and knowledge of the falsity of the scheme. Defendant Cohen is an employee at Freedom Books. On at least one occasion, he assisted an individual

in the filing of a zero-income tax return. Henline, at Exhibit 14. Cohen also prepared a zero-income return for an undercover IRS special agent posing as a customer and charged her $50. Cohen did not sign the "return preparer" portion of the return, and told the undercover agent that not attaching Schiff's two-page attachment would make it more difficult for the IRS to detect Schiff's and Cohen's customers. Henline, at Ex. 14 and Irey Decl., paras. 4-8 and Exhibits 1-3.

In sum, the government has shown that defendants knowingly participated in and promoted a tax scheme built on concepts and resulting in conduct that have been rejected by federal courts.[5]

C. Materiality

If a particular statement has a substantial impact on the decision-making process or produces a substantial tax benefit to a taxpayer, the matter is properly regarded as "material" within the meaning of § 6700. *United States v. Estate Preservation Services*, 38 F. Supp. 2d 846, 855 (E.D. Cal. 1998) (citing *United States v. Buttorff*, 761 F.2d 1056, 1059 (5th Cir. 1985)), *aff'd*, 202 F.3d 1093 (9th Cir. 2000).

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[5] Defendants argue that during the preliminary injunction hearing, the government was bound to show Schiff's witnesses the law that made them liable for income taxes. The legal authority supporting the conclusion that defendants made or caused to be made false or fraudulent statements concerning the tax benefits to be derived from the scheme was presented in the government's briefs. Moreover, legal precedent rejecting the bases for Schiff's scheme are applied by this court whether presented by a party or not. Furthermore, that the government has not brought criminal charges against defendants does not weaken its authority to pursue the civil relief available in this action.

It cannot be seriously questioned that defendants' statements are material.

D. Likelihood of Future § 6700 Violations

Factors that the court may consider in determining the likelihood of future § 6700 violations, and thus, the need for an injunction, include: (1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation: (3) the defendant's degree of scienter, (4) the isolated or recurrent nature of the infraction; (5) the defendant's recognition (or non-recognition) of his own culpability: and (6) the likelihood that defendant's occupation would place him in a position where future violations could be anticipated. *Estate Preservation*, 202 F.3d at 1105.

Here, recurrence of the violations is likely. Schiff organized the scheme, and he and the other defendants have each participated in the sale and promotion of the scheme which has involved over 3,000 individuals and an estimated $56 million in attempted tax evasion; each has done so knowingly and on numerous occasions; each is unapologetic and each is involved directly with the scheme as a matter of employment.

III. Violations of § 6701

Under 26 U.S.C. § 6701(a), "[a]ny person who (1) aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim or other document, (2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and (3) who knows that such portion (if so

used) would result in an understatement of the liability for tax of another person" shall pay a penalty.

As previously discussed, the government has shown by a preponderance of the evidence that Schiff, Neun and Cohen have violated § 6701 by preparing false tax returns and other tax-related documents for their customers. These returns and documents falsely report that their customers have no taxable income and no tax liability. Schiff, Neun, and Cohen knew and intended that these documents would be used in connection with material tax matters and result in the understatement of tax liability.

Defendants have failed to refute the government's evidence or raise legal authority contrary to these findings. Therefore, their course of conduct in furtherance of the abusive tax scheme is subject to the preliminary injunction as set forth below.

IV. First Amendment

The court must consider whether the preliminary injunction violates the First Amendment. Defendants argue that any restriction of their activities or publications amounts to an infringement of speech. The court is cognizant that "[t]emporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints," *see Alexander v. United States*, 509 U.S. 544, 550 (.993), and that prior restraints are generally presumed unconstitutional. *See New York Times Co. v. United States*, 403 U.S. 713 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) ("Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'"). However, as the

Supreme Court has indicated, not all prior restraints are prohibited. *See Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). Indeed, numerous federal courts have imposed § 7408 injunctions on similar abusive tax schemes without violating the First Amendment. *See Estate Preservation*, 202 F.3d 1093; *United States v. Raymond*, 228 F.3d 804 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001); *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987); *United States v. Smith*, 657 F. Supp. 646 (W.D. La. 1986), *aff'd*, 814 F.2d 1086 (5th Cir. 1987); *United States v. White*, 769 F.2d 511 (8th Cir. 1985); *United States v. Buttorff*, 761 F.2d 1056, 1066 (5th Cir. 1985); *United States v. Bell*, 238 F. Supp.2d 696 (M.D. Pa. 2003); *United States v. Shugarman*, 596 F. Supp. 186 (E.D. Va. 1984); *United States v. Savoie*, 594 F. Supp. 678 (W.D. La. 1984). *See also Nat. Commodity and Barter Ass'n/Nat. Commodity Exch. v. United States*, 843 F. Supp. 655 (D. Colo. 1993) (dismissing suit raising First Amendment challenge to § 6700 penalty), *aff'd*, 42 F.3d 1406 (10th Cir. 1994), *cert. denied*, 516 U.S. 807 (1995); *Bell v. Rossotti*, 227 F. Supp.2d 315 (M.D. Pa. 2002) (dismissing complaint seeking declaratory judgment that websites on tax law were protected by the First Amendment).

As the court has previously explained, defendants knowingly promote and participate in an abusive tax scheme that teaches taxpayers that they may lawfully file zero-income tax returns and exempt withholding statements to avoid paying taxes, and assists them in doing so. This message is subject to injunction as false, misleading and deceptive commercial speech, incitement, and aiding and abetting illegal conduct as discussed below.

A. Commercial Speech

Commercial and noncommercial speech are protected under the First Amendment; however, the Constitution accords less protection to commercial speech than other protected forms of expression. *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir.) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980)), *amended*, 160 F.3d 541 (1998).[6] The Supreme Court has acknowledged that the "precise bounds" of commercial speech are "subject to doubt," *Zauderer v. Supreme Court of Ohio*, 471 U.S. 626, 637 (1985), and has candidly recognized "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). Not unexpectedly, therefore, the Court has defined commercial speech in two ways. "Core" commercial speech is an expression that "does no more than propose a commercial transaction." *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Core commercial speech includes "advertising pure and simple." *Zauderer*,

[6] There is no dispute that while the First Amendment protects commercial speech generally, it does not protect false commercial speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 n. 7, (1996) ("The First Amendment does not protect commercial speech about unlawful activities."); *Central Hudson*, 447 U.S. at 562-63 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n. 24 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . The First Amendment . . . does not prohibit the State from ensuring that the stream of commercial information flow[s] cleanly as well as freely.").

471 U.S. at 637. The other definition of commercial speech is somewhat broader: "[E]xpression[s] related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.

1. Commercial Speech Aspects of the Scheme

In ruling that abusive tax schemes may be enjoined to the extent that the injunction "proscribes . . . fraudulent conduct," 202 F.3d at 1106, the Ninth Circuit explained in *Estate Preservation* that "a promoter's statements regarding the tax benefits of his [abusive tax schemes]" constitute commercial speech. 202 F.3d at 1106 (quoting *Buttorff*, 761 F.2d at 1066). The *Estate Preservation* court affirmed an injunction that reached "the organizing, promoting, marketing, or selling," of the scheme. 202 F.3d at 1096 n.3.[7]

As previously discussed, Schiff's enterprise advertises and sells books, tapes and other products over the internet, and through Freedom Books, his store in Las Vegas, Nevada, and other avenues to promote his scheme. Schiff also advertises and markets seminars and workshops to instruct attendees on how anyone can implement his formulas for avoiding payment of income taxes. As part of the scheme, Schiff offers for sale letter-writing services

[7] The importance of *Estate Preservation* to this court's First Amendment analysis cannot be overstated. That case is the only Ninth Circuit precedent addressing a First Amendment challenge to a § 7408 injunction based on § 6700 violations. The ACLU's attempt to distinguish *Estate Preservation* because it involves the marketing of abusive tax trusts is off the mark. The schemes involved in *Estate Preservation* and the instant case share a common purpose, to avoid taxes, a common liability under § 6700, and common First Amendment considerations.

and "personal consults." He also holds himself out as a "tax consultant," with experience and background in fields related to taxation.

Definitely, the portions of the scheme that would be considered "core" commercial speech, i.e., that speech which proposes no more than a commercial transaction, may be enjoined if they are deceptive or misleading. Such advertising of the scheme would include statements or suggestions that (1) persons can legally stop paying taxes, or become tax free through the use of the scheme, (2) income tax is voluntary, or that there is no law requiring anyone to pay income tax, (3) there is no income tax, only a profits tax, (4) it is legal to report zero income regardless of what you may have earned, and (5) it is legal to stop the withholding of taxes by submitting an "exempt" W-4 form.

The extent to which commercial speech reaches beyond "core" commercia speech, and includes the broader category of "expression related solely to the economic interests of the speaker and its audience," is illustrated by the Ninth Circuit's decision in *Estate Preservation*. In that case, the court affirmed a § 7408 preliminary injunction against the organizers and promoters of Estate Preservation Services ("EPS"), for violation of § 6700 in the marketing of trusts and other asset protection devices, including certain irrevocable non-grantor trusts called "Asset Preservation Trusts" or "APTs". 202 F.3d at 1097. Henkell, the central figure in promoting and organizing the activities of EPS, established and conducted seminars during which he advised individuals how to create and use APT's to generate tax deductions and reduce tax liability. To market the APTs, Henkell published a training manual. The manual "made numerous representations about the permissibility

of tax deductions and credits purportedly available to APTs." *Id.*

The district court found that the manual, materials and representations by defendants contained fraudulent statements regarding the use of the trusts,[8] and enjoined defendants from "organizing, selling, or assisting in the organization of an entity or otherwise promoting any plan or arrangement based upon" these statements. The preliminary injunction also prohibited defendants from "organizing, promoting, marketing, or selling [the trusts], and any abusive tax shelter, plan, or arrangement which advises or encourages taxpayers to attempt to violate internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities." *Id.* at 1096 n. 3.

The *Estate Preservation* court rejected a First Amendment challenge to the injunction, holding that it "prescribes only fraudulent conduct." *Id.* at 1106. In so doing, the court observed that other courts have upheld similar injunctions in spite of First Amendment challenges, quoting *Buttorff*, 761 F.2d at 1066 (emphasis added):

> [W]here it has been determined that [a promoter's] statements regarding the tax benefits of his trust, *which constitute commercial speech*, are misleading in the context contemplated by Congress in enacting the statute, and the injunction prohibiting such statements is adequately tailored and construed to enjoin

[8] The fraudulent statements concerned (1) the basis of property placed in trust; (2) the strategy of "upstreaming" income; (3) the deductibility of personal expenses and the depreciation of an owner-occupied home; and (4) the deductibility of certain donations to donor-directed charitable foundations. *Estate Preservation*, at 1099.

> only *such commercial speech* which has been shown to be both misleading and likely to promote illegal activity, such representations are not protected by the First Amendment.

Buttorff, and the two other cases cited by the *Estate Preservation* court, *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987), and *United States v. White*, 769 F.2d 511 (8th Cir. 1985), each applied a broader definition of commercial speech than "advertising, plain and simple." *Buttorff* involved a kit of trust forms that was marketed with the scheme and included a declaration, introductory materials, and step-by step instructions for creating and maintaining the trust. The promoter of the plan also participated in setting up the trusts and provided for the preparation of his customers' income tax returns. 761 F.2d at 1057 n.1. The commercial speech in *Buttorff* reached "[a]ppellant's representations regarding the tax advantages of his trust." *Id.* at 1066.

In *Kaun*, the Seventh Circuit affirmed the injunction against a tax protest group that promoted false plans to avoid the payment of taxes. Forms, pamphlets and information kits were sold at the protest group's meetings. The *Kaun* court applied the *Central Hudson* definition of commercial speech, "expression related solely to the economic interest of the speaker and its evidence," to reach not only advertising, but "marketing, or selling any documents or other information advising taxpayers that wages, salaries, or other income . . . are not taxable." 827 F.2d at 1152.

In *White*, the Eighth Circuit affirmed an injunction against a group that marketed to the public a packet of materials consisting of a cassette tape and written materials (including sample federal income tax forms). The

materials contained "detailed instructions about false or fraudulent means to evade federal income taxes, especially as applied to the taxation of wages, salaries or other compensation for labor or services." 769 F.2d at 512. In addition to the packets of materials, the group "orally instructed individuals and offered for sale materials on how to harass and impede employees of the Internal Revenue Service (IRS)." *Id.*

In its First Amendment analysis, the *White* court applied the broader definition of commercial speech:

> Appellant next argues that the injunction constitutes an impermissible prior restraint in violation of the first amendment. We disagree. Appellant's representations were made in connection with his efforts to promote and sell for profit [the plan] and thus constitute commercial speech. . . .
>
> . . .
>
> The commercial speech in question in the present case, appellant's representations regarding the allowability of deductions, the excludability of income and the tax benefits of the [plan], was not only completely misleading, but it also promoted tax evasion and abusive tax avoidance.

769 F.2d at 516, 517. The court went on to state that such misleading advertising may be prohibited entirely because "the first amendment does not protect commercial speech which promotes an illegal activity or transaction." *Id.*

Thus, *Estate Preservation*, read in the context of its supporting case law, and in light of the reach of the injunction it approved (prohibiting the "promoting, marketing or selling" of the abusive tax shelter), must be taken to apply

a definition of commercial speech broader than "core" commercial speech.[9]

In approving the broad terms of the injunction, the *Estate Preservation* court also took into account that the promoters, all of whom were well-educated and familiar with tax matters, were essentially selling fraudulent tax advice through the scheme. 202 F.3d at 1097, 1103. Along these lines, the *Estate Preservation* court made a point of emphasizing that:

> Appellants may continue to publish legitimate tax planning advice, even regarding trusts. They are simply prohibited from advocating shelters that provide no legitimate shelter from lawful taxation. Every honest and qualified tax consultant knows the difference between legitimate and plainly illegitimate tax shelters. Appellants crossed the line into the "plainly illegitimate".

Id. at 1106. Given this context, the court determined that the injunction "proscribes only fraudulent conduct." *Id.*

Similarly, the *Buttorff* and *Kaun* cases cited by *Estate Preservation* in its First Amendment analysis also give weight to the tax-advice context of the prohibited speech. In agreeing that the promoter of the tax scheme was engaged in commercial speech, the *Buttorff* court explained:

> The statements [appellant] has made concerning the purported tax benefits of [the scheme] were made in an effort to promote and sell the packaged trust forms and his personal services in connection therewith, all

[9] In fact, the term "advertising" is not found in the *Estate Preservation* injunction.

> for profit. The United States Supreme Court has summarized the commercial speech doctrine in the context of advertising for professional services: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.

761 F.2d at 1066. And in *Kaun*, the court ruled that "[i]nsofar as Kaun holds himself out as a tax adviser, his advertising and marketing activities in that regard [i.e., within the *Central Hudson* definition] are commercial speech." 827 F.2d at 1152. *See also Raymond*, 228 F.3d at 815 (false, deceptive or misleading commercial speech related to the provision of tax advice may be prohibited); *Smith*, 657 F. Supp. at 659 (banning manual promoting personal services through commercial speech).

Accordingly, the court follows *Estate Preservation* in applying a commercial speech standard to expression involved in not only the advertising, but also the promoting, marketing or selling of the scheme. Furthermore, following *Estate Preservation*, the court finds that to the extent Schiff holds himself out to be a tax consultant, familiar with the taxing system, and experienced in tax-related fields, the promotion, marketing and sales of the

scheme involves the offering of fraudulent tax advice, and is not protected by the First Amendment.[10]

2. The Federal Mafia

The American Civil Liberties Union of Nevada, in amicus curiae (hereafter the "ACLU"),[11] while taking no position on the merits of the tax plan,[12] argues that a ban on the sale of the book *The Federal Mafia* would amount to an impermissible prior restraint. According to the ACLU, *The Federal Mafia* cannot be characterized as commercial speech because (1) it does not fit the definition of commercial speech as proposing no more than a commercial transaction, (2) it is sold in bookstores and through the Internet independent of the tax scheme, and (3) it is not promoted through paid memberships involving face-to-face communication. Thus, the ACLU urges that the court must apply the more stringent *Brandenburg* incitement standard before subjecting the book to the preliminary injunction.

The court first considers whether the book qualifies as commercial speech. The ACLU argues that the Supreme

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[10] Indeed, as previously discussed, defendants' sophistication and education in tax matters meets the scienter requirement of a § 6700 violation.

[11] The ACLU is joined in its briefs by the Association of American Publishers, Inc., the American Booksellers Foundation for Free Expression, the Freedom to Read Foundation of the American Library Association, and the PEN American Center.

[12] The ACLU stakes out its position with respect to the scheme in these words "[W]e take no position on the truth or falsity of any of Mr. Schiff's theories;" the scheme is "beyond the scope of our concerns;" and "[The Federal Mafia] contains significant political discourse. At least that is Mr. Schiff's contention."

Court and the Ninth Circuit have recently applied the "core" notion of commercial speech, and that the definition of expression that "does no more than propose a commercial transaction" should be used to characterize *The Federal Mafia*. Even if the court applies just the "core" definition, however, the book contains "advertising pure and simple." *The Federal Mafia* includes not only a description of a number of other books written and published by Schiff, but also a description of a cassette seminar and audio reports, and their prices. *The Federal Mafia*, at 303-04. The advertisement for the cassette seminar declares that the seminar contains highlights from *The Federal Mafia*, and promises that "[i]f you are happy with *The Federal Mafia*, you will be thoroughly delighted with this 5 ½ hour cassette seminar." As previously indicated, one "highlight" of *The Federal Mafia* is its reference to instructions and materials to be used in submitting false withholding forms and zero-income tax returns. Among the audio reports advertised in the book are those that promise to "deliver explosive new information to enable us to neutralize and frustrate IRS procedures in practically every situation," and provide a document "that will allow you to blow away all IRS claims that you owe them any money whatsoever for income taxes."

The ACLU also suggests that *The Federal Mafia* "does no more than propose a commercial transaction" because it contains autobiographical and political expression. However, commenting on public issues in the context of a commercial transaction does not elevate speech from commercial to political rank. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983) ("[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded

noncommercial speech.") (citing *Central Hudson*, 447 U.S. at 563 n.5); *Zauderer*, 471 U.S. at 637 n.7. (same).

Furthermore, the commercial speech components of *The Federal Mafia* are not "inextricably intertwined" with its protected expression. *See Discovery Network*, 507 U.S. at 426 n. 21; *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 474-75 (1989) ("No law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."). Likewise, "no law of man or nature makes it impossible" for Schiff to publish his ideology or comment on matters of public concern without advertising his tax scheme or the products related to the scheme. The commercial speech found in *The Federal Mafia* does not help finance the publication of the book, as outside advertising often finances publications. Rather, the advertising in *The Federal Mafia* markets other Schiff products, materials and services, many of which are related to the tax scheme. Therefore, even under the narrow "core" definition of commercial speech, the false, misleading or deceptive elements of that speech would be enjoinable.

Significantly, however, as previously discussed, the injunction in *Estate Preservation* reaches beyond "advertising" to include the "promoting, marketing or selling" of the scheme. In considering the promotional, marketing and sales methods used in the scheme, the *Estate Preservation* court found a nexus between the training manual and the marketing of the tax scheme. 202 F.3d at 1097. The court did not address whether the manual contained specific advertising for the scheme, but held that it "made numerous representations about the permissibility of tax deductions and credits purportedly available to [the trusts]." *Id.*

In similar fashion, portions of *The Federal Mafia* are linked to the marketing of Schiff's tax scheme. The tax scheme's promotions identify the book as the starting point of the program, and represent that "[i]t shows you how to file the zero return, stop your wage withholding, and explains the basics." Cantrell, at 062. Other advertising for the book states that it "provides the information and documents required to immediately stop your wage withholding, and to file a request for a refund of all the taxes you paid." Cantrell, at 018. *The Federal Mafia* is marketed as part of almost all of Schiff's instructional packages. Consistent with *Estate Preservation*, therefore, *The Federal Mafia*'s commercial speech nature includes the training-manual characteristics of the book (including instructions and materials regarding the false filings of zero returns and submissions of W-4s) that further the promotion, marketing and sales of the overall tax scheme.

The court has further support for applying a commercial speech definition reaching the "promoting, marketing, or selling" of the scheme from the Fifth Circuit. In *United States v. Smith*, 657 F. Supp. 646 (W.D. La. 1986), *aff'd*, 814 F.2d 1086 (5th Cir. 1987), the Fifth Circuit affirmed an injunction on the basis of the district court opinion which prohibited the marketing and sale of a manual (including forms and instructions) authored and published by defendant on how to establish unlawful trusts, along with various services to customers. The district court determined that defendant's First Amendment rights were fully protected so long as the injunction did not "proscribe all commercial speech, but [was] limited to specific representations concerning tax benefits which are misleading." 657 F. Supp. at 658. The *Smith* court observed that in *Buttorff*, 761 F.2d at 1066 (the case quoted in *Estate Preservation*), a

First Amendment challenge was rejected "because Buttorff's representations concerning purported tax benefits were made in an effort to promote and sell certain packaged trust forms and personal services, all for profit to Buttorff." 657 F. Supp. at 658. Likewise, those representations in *The Federal Mafia* which promote the use of the tax scheme for profit to Schiff are commercial speech not shielded by the First Amendment.

The ACLU next argues that the cases cited by the government in which printed materials are banned involve only marketing of the materials in face-to-face contacts or through paid memberships; whereas *The Federal Mafia* is sold independently in bookstores or online to the public and is neither a direct part of the scheme nor marketing for it. According to the ACLU, Schiff's marketing of *The Federal Mafia* through impersonal channels in which it can stand alone from the scheme sets it apart from the schemes in other cases. This distinction, however, is unsound.

The Federal Mafia, while being marketed openly to the public through Freedom Books bookstore and online, is also advertised and sold in Schiff's live and taped seminars and instructional packages as "the starting point" for the scheme. Far from containing merely commentary, information and expression of opinion regarding the legitimacy of the tax system, the book is, in part, a how-to manual directed to specific individuals seeking instructions, sample forms, and attachable affidavits to be used in the filing of false income tax returns and submission of false W-4s. Morever, the information refers the reader to other materials, seminars and personal assistance to achieve that end. The book does not provide information or advocacy on tax reform in general, and then leave the

reader to act on his own judgment, or consider the advice of legitimate tax professionals before engaging in conduct of legal significance. Rather, it is part of the effort to sell for profit Schiff's materials and services. In this regard, *The Federal Mafia* hardly stands alone, but by its very essence is closely connected to the scheme expressly and financially. *See Smith*, 657 F. Supp. at 658 (discussing *Buttorff*).

Nor is the court persuaded by the ACLU's argument that *Estate Preservation* and other § 7408 cases cited by the government involve the marketing of materials only in face-to-face or membership contexts. In *Estate Preservation*, the promoter published the training manual to market the trusts, and also conducted seminars where he advised customers. In *White*, the scheme included both the sale of packets of materials, and separate meetings where the group instructed individuals on harassment techniques. *See also United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (rejecting First Amendment challenge to conviction involving drug manufacturing instructions mailed to countless customers with whom defendant had no personal contact); *Buttorff*, 572 F.2d at 622-23 (affirming, despite First Amendment challenges, convictions for providing tax evasion information at "large public gatherings" to participants whom the defendants did not personally meet); *Smith*, 657 F. Supp. at 649-50 (manual marketed separately from other aspects of program).

The ACLU also overstates its claim that the government has cited only cases involving materials that are exclusively part of the scheme, rather than containing a combination of protected and unprotected speech. In *Estate Preservation*, the court affirmed a ban on the distribution of the training manual even though the

district court found only four of numerous representations contained false statements about the trusts' tax benefits. 202 F.3d at 1099; *United States v. Estate Preservation Serv.*, 38 F. Supp.2d 846, 851 (E.D. Cal. 1998). *See also Raymond*, 228 F.3d 804 (rejecting First Amendment challenge as it related to injunction on the marketing or sale of a three-volume set of materials which included both information regarding general tax-protest principles, and forms and instructions to guide the purchaser through submission of W-4 forms claiming exempt status, the filing of IRS refunds requests for prior years, and the filing of tax returns to reflect no income tax liability); *Smith*, 657 F. Supp. at 649 (manual "reviews the characteristics and prescribes the means to create various types of trusts, to include the family preservation trust").

Finally, to the extent that the contents of *The Federal Mafia* identify Schiff as a tax consultant, publicize his tax-related background and qualifications, and promote, market or sell his advice, the book falls within the fraudulent tax-advice standard of *Estate Preservation*. Based on these considerations, the court finds that the commercial speech and tax advice aspects of the scheme (including those contained in *The Federal Mafia*) can be enjoined to the extent that they are false, misleading or deceptive.

B. Incitement

It is well-settled that the First Amendment protects an individual's right to disagree with the law and to advocate the violation of a law. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). There is no protection, however, for speech or advocacy that is directed toward producing imminent lawless action. *Id.* (The government may forbid

advocacy of law violation "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). Moreover, "[t]he mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448. The court finds that defendants have gone beyond permissible advocacy by instructing others in a way that is "directed to inciting or producing imminent lawless action."

The stated purpose of Schiff's scheme is to advise purchasers about how to "legally stop paying taxes." As discussed previously, however, Schiff's scheme is anything but legal. Through live and recorded seminars, materials, and personal assistance, Schiff and his co-defendants show their customers how to file false tax returns and withholding statements. Schiff supplies his customers with sample forms or fill-in-the-blank forms to be used in the filings. For instance, Schiff's materials include sample "zero returns" and advise that they be filed "only by attaching to it our two-page attachment." Schiff's encouragement of customers that "income tax is voluntary," and his assurances that "[f]or income tax purposes, you can legally report 'zero' income and pay no income taxes regardless of how much you might have earned," or that customers can "legally stop paying taxes," using his program, in combination with the direct facilitation of filing false returns and exempt withholding forms, moves Schiff's form of advocacy into the realm of incitement. *See Kaun*, 827 F.2d at 1151 (tax group "may not incite other [members] or would-be members to understate their tax liability or avoid paying taxes by means of the false and frivolous theories . . . ".); *Raymond*, 228 F.3d at 815; *United States v. Kelley*,

769 F.2d 215, 217 (4th Cir. 1985) (no First Amendment protection for telling listeners "what to do and how to prepare the [tax] forms" and supplying them with [tax] forms and materials, even though seminars were dedicated to the belief "that the federal income tax is unconstitutional as applied to wages. . . . It was no theoretical discussion of non-compliance with laws; action was urged; the advice was heeded, and false [tax] forms were filed"); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir.) (affirming criminal conviction for aiding and abetting others to violate tax laws; defendants' speech incited several individuals to undertake imminent lawless action), *cert. denied*, 437 U.S. 906 (1978); *Nat. Commodity and Barter Ass'n/Nat. Commodity Exch. v. United States*, 843 F. Supp. 655 (D. Colo. 1993) ("[T]he NCBA went beyond advocating nonpayment of taxes in general."), *aff'd*, 42 F.3d 1406 (10th Cir. 1994), *cert. denied*, 516 U.S. 807 (1995).

Furthermore, the government has presented evidence that Schiff's tax scheme actually persuaded others to violate the law. The IRS identified nearly 5,000 zero-income federal income tax returns filed by some 3,100 customers of Schiff's organization during the past three years using Schiff's two-page attachment referenced in *The Federal Mafia*, supplied with its purchase, and identified by promotional materials as a requirement to the filing of the zero-income tax return tutored by *The Federal Mafia* and other of Schiff's instructional services. If that circumstantial connection were not enough, Schiff's own witness at the preliminary injunction hearing testified that he obtained the zero-income return that he filed from *The Federal Mafia*. *See Kaun*, 827 F.2d at 1151 n. 3 (no need to address whether injunction reached mere advocacy

of non-payment of taxes "because [defendant's] activities did in fact lead to lawless action").

The ACLU suggests that *The Federal Mafia*, standing alone and sold to the public separately from other Schiff's services and products, is too removed to pose a risk of incitement to imminent unlawful conduct. First of all, as previously discussed in section III.A., speech is not insulated by the First Amendment merely because it is impersonally disseminated to a wide audience. Morever, in this case, because of the interrelated nature of the book and other ongoing aspects of the scheme, a *Brandenburg* analysis of the book in isolation would be rather unrealistic. *The Federal Mafia* incorporates the scheme. It contains all of the instructions, sample forms and attachments necessary for the filing of the false tax forms. According to Schiff, it "provides the information and documents required to immediately stop your wage withholding, and to file a request for a refund of all the taxes you paid," and "shows you how to file the zero return, stop your wage withholding, and explains the basics." Those portions of *The Federal Mafia* are inherently linked to the scheme's design and purpose and are centrally intertwined with and instrumental in the overall scheme. *See United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (defendants disseminated a computer program that assisted others to record and analyze bets on sporting events; program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection"). Thus, the book retains its intrinsic relationship to the scheme whether it is packaged or marketed with or without other Schiff products or services.

But the government's showing of imminence stemming from a reading of *The Federal Mafia* goes even further. The government's evidence includes Schiff's advertising containing various testimonials of individuals who claim to have avoided paying taxes by using nothing more than *The Federal Mafia*. Cantrell, at 029, 030, 031, and 035-036. Morever, while the government may not have shown that any particular one of the 3,000 taxpayers to have filed zero-income returns used *The Federal Mafia*, exclusively, a strong inference of that conclusion can be drawn from the exactness of the over 5,000 forms filed and those furnished in or through the book. *See White*, 769 F.2d at 512 ("The government had presented evidence of at least fifteen federal income tax returns for the 1982 calendar year filed in the St. Paul district which appeared to be based upon [the plan]."). This inference is further strengthened by Schiff's marketing of the book. In Schiff's internet advertising, he identifies *The Federal Mafia* as necessary to "show[] you how to file the zero return, stop your wage withholding, and explain[] the basics," while referring to the seminars as recommended: "It's good for you to get a Seminar, either live, cassette, or on video." Cantrell, at 062. Simply put, Schiff, by the very words used to promote his wares, settles the question of the imminence of unlawful action induced by *The Federal Mafia*.

Therefore, the injunction will proscribe speech that incites others to violate the tax laws, including the evasion of assessment and payment of taxes.

C. Illegal Conduct

The First Amendment does not protect conduct which uses speech as part of a criminal transaction. *See United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia). The Fourth Circuit has elaborated:

> [T]he law is now well established that the First Amendment and *Brandenburg*'s "imminence" requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because "culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes."

Rice v. Paladin Enters., Inc., 128 F.3d 233, 246 (4th Cir. 1997)[13] (quoting Department of Justice, "Report on the Availability of Bomb-Making Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the Constitution" 37 (April 1997)), *cert. denied*, 523 U.S. 1074 (1998). *See also* Laurence H. Tribe, *American Constitutional Law* 837 (2d ed. 1988) ("[T]he law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their

[13] Put another way, Brandenburg may be relevant only if the act of selling information could be prosecuted regardless of whether there was proof that anyone used the information.

own bombs out of old Volkswagen parts."); Greenawalt, *Speech, Crime, and the Uses of Language* 85 (1989) ("[T]he justifications for free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed."); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir.1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself.").

In *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir.1982), the defendant argued that he was immune, under the First Amendment, from search for evidence of the sale of printed instructions for the manufacture of an illegal substance. The court derided, as a "specious syllogism" with "no support in the law" the defendant's argument that the First Amendment protects the sale of the instruction manual simply because the First Amendment protects the written word. *Id.* at 842. In holding that the First Amendment does not provide a defense to the use of printed speech in encouraging and counseling others in the commission of a crime, the Barnett court cited the language of *Buttorff*, 572 F.2d 619, in which defendants were convicted of aiding and abetting persons who filed false or fraudulent tax returns after hearing defendants address a public meeting about ways to avoid payment of taxes, including submitting false exemption forms to stop allowances:

> Although the speeches here do not incite the type of imminent lawless activity referred to criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This

> speech is not entitled to first amendment protection, and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

576 F.2d at 624.

Likewise, in *United States v. Freeman*, 761 F.2d 549 (9th Cir.1982), *cert. denied*, 476 U.S. 1120, 106 S.Ct. 1982, 90 L.Ed.2d 664 (1986), the Ninth Circuit concluded that the defendant could be held criminally liable for counseling tax evasion at seminars held in protest of the tax laws, even though the speech that served as the predicate for the conviction "spr[ang] from the anterior motive to effect political or social change." *Id.* at 551. The defendant claimed that he did nothing more than advocate tax noncompliance as an abstract idea, or at most as a remote act, and that the First Amendment therefore barred his prosecution. *Id.* at 552. The court noted, however, that "[t]here was . . . substantial evidence of Freeman's use of words of incitement quite proximate to the crime of filing false returns, words both intended and likely to produce an imminent criminal act." *Id.* at 552. The court further rejected defendant's argument that the legality of the transaction he proposed was unsettled, and therefore, the likelihood of an imminent violation could not be established: "[T]he falsity of the returns prepared under Freeman's instructions and the concomitant illegality of their filing are manifest." *Id.*[14]

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[14] On the defendant's entitlement to free speech jury instructions, the court held that a First Amendment instruction was required only for those counts in which there was evidence that the speaker "directed his comments at the unfairness of the tax laws generally, without soliciting or counseling a violation of the law in an immediate sense

(Continued on following page)

Barnett and Freeman were relied on heavily by the Fourth Circuit in *Rice*, 128 F.3d 233. In that case, the court ruled that a "hit man" instruction book was not entitled to protection under the First Amendment's free speech clause as abstract advocacy. *Id.* at 243 ("[W]hile even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech which, in its effect, is tantamount to legitimately proscribable non-expressive conduct may itself be legitimately proscribed."). That book methodically and comprehensively prepared and steeled its audience to specific criminal conduct through detailed instructions on the commission of criminal conduct. *Id.* at 263-65.

Not unforeseeably, other circuits have recognized that the First Amendment does not shield criminal conduct in tax schemes which take, in whole or in part, the form of speech. *See United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir.1996) (defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to First Amendment jury instruction because "[t]he defendants' words and acts were not remote from the commission of the criminal acts."), *cert. denied*, 521 U.S. 1106, 117 S.Ct. 2484, 138 L.Ed.2d 992 (1997); Kelley, 769 F.2d at 217 (no First Amendment protection for telling listeners "what to do and how to prepare the [tax] forms" and supplying them with [tax] forms and materials, even though seminars were dedicated to the belief "that the

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[and] made statements that, at least arguably, were of abstract generality, remote from advice to commit a specific criminal act." 761 F.2d at 551-52. As to those counts which the defendant, through his speech, directly assisted in the preparation and review of false tax returns, the court held that the defendant was not entitled to a First Amendment instruction at all. *Id.*

federal income tax is unconstitutional as applied to wages. . . . It was no theoretical discussion of non-compliance with laws; action was urged; the advice was heeded, and false [tax] forms were filed"); *United States v. Moss*, 604 F.2d 569, 571 (8th Cir.1979) (First Amendment does not protect defendant's speech in which he challenged constitutionality of federal income tax laws and described how to avoid the federal withholding tax, where, motivated by defendant's speech, employees filed falsified W-4 forms and were prosecuted for violating statute pertaining to fraudulent withholding exemption certificate), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980).

In this case, the government has presented evidence showing that the scheme's stated purpose was, in part, to assist in the commission of a crime, even though the promoters may disagree that such assistance is criminal.[15] The government has also shown that the scheme was targeted toward, and reached, individuals who actually employed it to file false zero income tax returns and falsely claim exempt withholding status. Therefore, to the extent that the injunction proscribes such conduct by organizers, promoters and marketers of the scheme, the First Amendment is not a barrier.

V. Conclusion

Based on the above, the court finds that a § 7408 preliminary injunction can be fashioned in a way that is

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[15] Of course, this is not equivalent to proving beyond a reasonable doubt that Schiff is guilty of a criminal offense. Any such determination would have to be made in the context of a criminal proceeding.

not an impermissible prior restraint on defendants' protected speech.

The first paragraph of the preliminary injunction is generally patterned on the first paragraph of the injunction approved in *Estate Preservation*. The second and third paragraphs enjoin activities subject to penalty under 26 U.S.C. §§ 6700 and 6701, and incorporate the language of those statutes. The fourth paragraph reaches advertising and marketing of false or misleading tax positions, and is generally patterned after portions of injunctions affirmed in *Kaun*, and *White*. The fifth paragraph prohibits aiding and abetting, and the sixth paragraph proscribes incitement to imminent unlawful conduct. The seventh paragraph prevents instructing or assisting others to interfere with the administration and enforcement of the internal revenue laws. The eight paragraph is authorized under § 7407. Paragraphs nine, ten and eleven enjoin conduct subject to penalty or injunction under statute.

In drawing up the preliminary injunction, the court is cautious not to limit defendants' legitimate tax-related activities or advocacy.

VI ORDER OF PRELIMINARY INJUNCTION

Based on the foregoing factual findings and legal conclusions, the court ORDERS that defendants Irwin Schiff, Cynthia Neun, and Lawrence N. Cohen, individually and all doing business as Freedom Books, www.paynoincometax.com, and www.ischiff.come, and any similar entities, and their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order are enjoined, pending the final disposition of this matter, from:

(1) Organizing, promoting, marketing or selling, or assisting in organizing, promoting, marketing or selling, any plan or arrangement which advises or encourages taxpayers to attempt to violate internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities, including those that promote, sell, or advocate the use of the "zero income" tax return, and the use of false withholding forms;

(2) Engaging in conduct subject to penalty under 26 U.S.C. § 6700, including organizing or selling a plan or arrangement and making or furnishing a statement regarding the excludability of income that they know or have reason to know is false or fraudulent as to any material matter;

(3) Engaging in conduct subject to penalty under 26 U.S.C. § 6701, including preparing an/or assisting in the preparation of a document related to a matter material to the internal revenue laws that they know (or have reason to believe) will result in an understatement of tax liability;

(4) Advertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes, including the positions that (1) persons can legally stop paying taxes or become tax free by using the plan or arrangement; (2) federal income tax is voluntary; (3) there is no law requiring anyone to pay income tax; (4) there is no income tax, only a profits tax; (5) it is legal to report zero income regardless of what you may have earned, or to use false withholding forms; (6) Schiff's personal services as witness or brief writer will be materially helpful in defending criminal prosecution; or any other any other false, misleading or deceptive tax position;

(5) Assisting others to violate the tax laws, including the evasion of assessment or payment of taxes, through any means, including selling services, books or other materials that provide direction about how to fill out fraudulent or false tax forms or other tax documents to be filed with the IRS or other entities;

(6) Inciting others to violate the tax laws, including the evasion of assessment and payment of taxes;

(7) Instructing or assisting others to hinder or disrupt the enforcement of internal revenue laws by filing frivolous lawsuits, taking frivolous positions in an effort to impede IRS audits and Collection Due Process Hearings, or engaging in other conduct intended to interfere with the administration and enforcement of the internal revenue laws;

(8) Preparing or assisting in the preparation of any federal income tax return for any other person;

(9) Engaging in any conduct subject to penalty under 26 U.S.C. § 6694 (preparing any part of a return or claim for refund that includes an unrealistic position);

(10) Engaging in any conduct subject to penalty under 26 U.S.C. § 6695 (failing to sign and furnish the correct identifying number on tax returns that they prepare); or

(11) Engaging in any other activity subject to injunction or penalty under 26 U.S.C. §§ 7407, 6694 or 6695, including fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws.

Further, pursuant to 26 U.S.C. §§ 7402 and 7407, the Court ORDERS that the defendants, if they have not previously done so, provide their complete list of people or

other entities who bought any product or service, including tax-return preparation, from them or Freedom Books from January 1, 1999, through the present, including names, addresses, phone numbers, e-mail addresses, and social security numbers or employer identification numbers, to counsel for the United States within ten days of the date of this Order. Schiff, Neun, and Cohen must each individually file a sworn certificate of compliance stating that he or she has complied with this portion of the Order, within ten days of the date of this Order.

Further, pursuant to 26 U.S.C. § 7402, the Court ORDERS that, within 10 days of the date of entry of this order, Schiff, Neun, and Cohen must place this Order, in its entirety, on the www.paynoincometax.com, and www.ischiff.com "Home" pages (i.e. the first page seen when accessing the websites at the listed addresses), prominently featured at the top so that it is easily visible.

Further, pursuant to 26 U.S.C. § 7402, the Court ORDERS that Schiff, Neun, and Cohen, at their own expense, provide a copy of this Order to each of their current customers (and former customers since January 1, 1999) within ten days of the date of this Order. Schiff, Neun, and Cohen must each individually file a sworn certificate of compliance stating that he or she has complied with this portion of the Order, within ten days of the date of this Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IRWIN A. SCHIFF; CYNTHIA NEUN; LAWRENCE N. COHEN, aka Larry Cohen, individually, and all doing business as FREEDOM BOOKS, www.livetaxfree.com www.paynoincometax.com and www.ischiff.com, Defendants-Appellants.	No. 03-16319 D.C. No. CV-03-00281-LDG ORDER (Filed Jan. 12, 2005)

Before: HUG, ALARCÓN, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Fletcher has voted to reject the suggestion for rehearing en banc and Judges Hug and Alarcón have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

CONSTITUTIONAL PROVISIONS, RULES OF CIVIL PROCEDURE AND ORDINANCES INVOLVED

United States Constitution, Amendment I provides, in part, that:

> "Congress shall make no law . . . abridging the freedom of speech[.]"

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26 U.S.C. 7407. Action to enjoin income tax return preparers.

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person who is an income tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as an income tax return preparer may be commenced at the request of the Secretary. Any action under this section shall be brought in the District Court of the United States for the district in which the income tax preparer resides or has his principal place of business or in which the taxpayer with respect to whose income tax return the action is brought resides. The court may exercise its jurisdiction over such action (as provided in section 7402(a) [26 USCS § 7402(a)]) separate and apart from any other action brought by the United States against such income tax preparer or any taxpayer.

(b) Adjudication and decrees. In any action under subsection (a), if the court finds –

(1) that an income tax return preparer has –

(A) engaged in any conduct subject to penalty under section 6694 or 6695 [26 USCS § 6694 or 6695], or subject to any criminal penalty provided by this title,

(B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as an income tax return preparer,

(C) guaranteed the payment of any tax refund or the allowance of any tax credit, or

(D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct, the court may enjoin such person from further engaging in such conduct. If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.

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26 U.S.C. 7408. Actions to enjoin specified conduct related to tax shelters and reportable transactions.

(a) Authority to seek injunction. A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in specified conduct. The court may exercise its jurisdiction over such action (as provided in section 7402(a) [26 USCS § 7402(a)])

separate and apart from any other action brought by the United States against such person.

(b) Adjudication and decree. In any action under subsection (a), if the court finds –

(1) that the person has engaged in any specified conduct, and

(2) that injunctive relief is appropriate to prevent recurrence of such conduct, the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) Specified conduct. For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is –

(1) subject to penalty under section 6700, 6701, 6707, or 6708 [26 USCS § 6700, 6701, 6707, or 6708], or

(2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code.

(d) Citizens and residents outside the United States. If any citizen or resident of the United States does not reside in, and does not have his principal place of business in, any United States judicial district, such citizen or resident shall be treated for purposes of this section as residing in the District of Columbia.

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26 U.S.C. 7402. Jurisdiction of district courts.

(a) To issue orders, processes, and judgments. The district courts of the United States at the instance of the United States shall have such jurisdiction to make and

issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees. Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(d) Repealed.

(e) To quiet title. The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction. For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

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26 U.S.C. 6700. Promoting abusive tax shelters, etc.

(a) Imposition of penalty. Any person who –

(1) (A) organizes (or assists in the organization of) –

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale) –

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter, shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $ 1,000 or, if the person establishes that it is lesser, 100 percent of

the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated. Notwithstanding the first sentence, if an activity with respect to which a penalty imposed under this subsection involves a statement described in paragraph (2)(A), the amount of the penalty shall be equal to 50 percent of the gross income derived (or to be derived) from such activity by the person on which the penalty is imposed.

(b) Rules relating to penalty for gross valuation overstatements.

(1) Gross valuation overstatement defined. For purposes of this section, the term 'gross valuation overstatement' means any statement as to the value of any property or services if –

(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

(B) the value of such property or services is directly related to the amount of any deduction or credit allowable under chapter 1 [26 USCS §§ 1 et seq.] to any participant.

(2) Authority to waive. The Secretary may waive all or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

(c) Penalty in addition to other penalties. The penalty imposed by this section shall be in addition to any other penalty provided by law.

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26 U.S.C. 6701. Penalties for aiding and abetting understatement of tax liability.

(a) Imposition of penalty. Any person –

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person, shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) Amount of penalty.

(1) In general. Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $ 1,000.

(2) Corporations. If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $ 10,000.

(3) Only 1 penalty per person per period. If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any

taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(c) Activities of subordinates.

(1) In general. For purposes of subsection (a), the term 'procures' includes –

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act.

(2) Subordinate. For purposes of paragraph (1), the term 'subordinate' means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision, or control.

(d) Taxpayer not required to have knowledge. Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim, or other document.

(e) Certain actions not treated as aid or assistance. For purposes of subsection (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) Penalty in addition to other penalties.

(1) In general. Except as provided by paragraphs (2) and (3), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) Coordination with return preparer penalties. No penalty shall be assessed under subsection (a) or (b) of section 6694 [26 USCS § 6694] on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

(3) Coordination with section 6700. No penalty shall be assessed under section 6700 [26 USCS § 6700] on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

Supreme Court, U.S.
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No. 04-1383

In the Supreme Court of the United States

IRWIN SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a preliminary injunction issued pursuant to 26 U.S.C. 7408, prohibiting petitioner from, *inter alia*, "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes," is consistent with the First Amendment.

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In the Supreme Court of the United States

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IRWIN SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 379 F.3d 621. The order of the district court granting the government's motion for a preliminary injunction (Pet. App. 20-65) is reported at 269 F. Supp. 2d 1262.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. A petition for rehearing was denied on January 12, 2005 (Pet. App. 66). The petition for a writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a long-time purveyor of fraudulent tax schemes who has repeatedly been convicted of attempted tax evasion and related offenses. Petitioner's most recent scheme, known as the "zero-income" scheme, encouraged participants to stop the withholding of tax from their wages and to report zero income on their tax returns. Pet. App. 24-27, 29-31.

Petitioner promoted the zero-income scheme through various products, ranging from seminars and personal consultations to books and tapes. The central item in petitioner's product line was his self-published book *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*. Pet. App. 26. Petitioner identified *The Federal Mafia* as the "starting point" for the zero-income scheme, and marketed it as part of various instructional packages. *Id.* at 49, 50-51. Petitioner claimed that the book "shows you how to file the zero return[] [and] stop your wage withholding, and explains the basics." *Id.* at 26. The book contains step-by-step instructions on how to participate in the zero-income scheme, and includes an attachment to be filed with a participant's tax return in order to "establish your claim that you had 'zero' income and are entitled to a full refund of all the taxes you paid for that year." *Id.* at 27. Although the book warns that a participant in the zero-income scheme risks going to jail, it elsewhere states that a participant cannot successfully be prosecuted (and offers petitioner's services as a witness and brief writer in the event that a prosecution occurs). *Id.* at 32-33.

Most relevant for present purposes, petitioner's book promotes many of his other products, and expressly en-

courages its readers to purchase those products. The book contains descriptions of assorted other books, videos, and audiotapes sold by petitioner, together with a price list. At various points, the book suggests that it would be "helpful" if readers purchased another book; encourages readers to attend one of petitioner's workshops and to subscribe to his "audio report"; and describes other products that petitioner is designing to further the zero-income scheme. Pet. App. 46-47; Gov't C.A. Br. 9 & n.4.

Petitioner's zero-income scheme substantially interfered with the federal income tax system. From 2000 to 2002, more than 3000 individuals filed tax returns using the attachment included in petitioner's book. Those individuals attempted to deprive the government of an estimated $56 million in tax revenue. Pet. App. 27-28.

2. The government filed suit against petitioner and two other individuals, seeking to enjoin them from marketing the zero-income scheme. C.A. E.R. 1-19. The government relied on several provisions of the Internal Revenue Code authorizing such relief: (1) 26 U.S.C. 7408, which authorizes injunctive relief against persons who have promoted abusive tax shelters (in violation of 26 U.S.C. 6700) or aided and abetted the understatement of tax liability (in violation of 26 U.S.C. 6701); (2) 26 U.S.C. 7407, which authorizes injunctive relief against persons who have improperly prepared tax returns (in violation of 26 U.S.C. 6694 or 6695); and (3) 26 U.S.C. 7402(a), which authorizes injunctive relief "as may be necessary or appropriate for the enforcement of the internal revenue laws." C.A. E.R. 12-15.

3. The district court granted the government's motion for a preliminary injunction. Pet. App. 20-65. The district court first held that the government had met the

requirements of 26 U.S.C. 7408 by demonstrating (1) that defendant had engaged in conduct in violation of 26 U.S.C. 6700 and 6701 and (2) that injunctive relief was appropriate to prevent recurrence of that conduct. Pet. App. 23-36. The district court then rejected defendants' contention that the injunction would violate the First Amendment. *Id.* at 36-62. At the outset, the court noted that "numerous federal courts have imposed § 7408 injunctions on similar abusive tax schemes without violating the First Amendment." *Id.* at 37. The court reasoned that the injunction was valid as a restriction on false and misleading commercial speech, speech that incites imminent lawless action, and speech that aids and abets criminal activity. *Ibid.*

As is relevant here, the district court determined that portions of petitioner's book constituted commercial speech because the book "includes not only a description of a number of other books written and published by [petitioner], but also a description of a cassette seminar and audio reports, and their prices." Pet. App. 47. The court added that other portions of the book that "further the promotion, marketing and sales of the overall tax scheme" likewise constituted commercial speech. *Id.* at 49. To the extent that the book also contained protected autobiographical and political expression, the court found, "the commercial speech components of *The Federal Mafia* are not 'inextricably intertwined' with its protected expression." *Id.* at 48. In a number of other cases involving First Amendment challenges to injunctions issued under 26 U.S.C. 7408, the court noted, the materials at issue similarly contained a combination of protected and unprotected speech. Pet. App. 51-52. The court concluded that "the commercial speech and tax advice aspects of the scheme (including those contained

in *The Federal Mafia*) can be enjoined to the extent that they are false, misleading or deceptive." *Id.* at 52.

The district court thus entered a preliminary injunction barring defendants from "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes." Pet. App. 63. The injunction also prohibited defendants from (1) organizing, promoting, marketing, or selling any plan or arrangement that advises or encourages others to attempt to violate the tax laws; (2) assisting or inciting others to violate the tax laws; (3) instructing or assisting others to hinder or disrupt the enforcement of the tax laws; (4) preparing tax returns for others; or (5) engaging in any other conduct that violates 26 U.S.C. 6700, 6701, 6694, or 6695. Pet. App. 63-64. The court stressed that the injunction was designed "not to limit defendants' legitimate tax-related activities or advocacy." *Id.* at 62.

4. The court of appeals affirmed. Pet. App. 1-19. After holding that the district court complied with 26 U.S.C. 7408 in issuing the preliminary injunction, see Pet. App. 6-7, the court of appeals rejected defendants' contention that the preliminary injunction was "unconstitutionally broad as it relates to *The Federal Mafia*," *id.* at 8. The court noted that petitioner was contending that commercial speech should be limited to "advertising pure and simple." *Id.* at 9. Even under that definition, however, the court observed that certain portions of petitioner's book would qualify as commercial speech. *Ibid.* The court ultimately determined that other portions of the book also constituted commercial speech, because "[t]he extravagant claims made in *The Federal Mafia* are designed to convince readers that they can lawfully

avoid paying their income taxes so that the readers will buy other products in [petitioner's] line." *Id.* at 11. The court concluded that "*The Federal Mafia* is an integral part of [petitioner's] whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax." *Id.* at 12.

Having thus defined the commercial-speech components of petitioner's book, the court of appeals next determined that "the expressive and political portions of *The Federal Mafia* are not 'inextricably entwined' with its commercial elements." Pet. App. 14. Petitioner, the court noted, "can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products." *Ibid.* "Because the protected and unprotected parts of the book are not inextricably intertwined," the court reasoned, "[petitioner] cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudulent commercial speech into full First Amendment protection." *Ibid.*

Finally, the court of appeals determined that the commercial speech contained in petitioner's book was fraudulent and therefore could be enjoined. Pet. App. 16. The court noted that, "[a]lthough [petitioner's] claims are far-fetched, they could mislead a customer into believing that he or she could use [petitioner's] products to legally stop paying income taxes." *Ibid.* Because the court concluded that the injunction was valid as a restriction on false and misleading commercial speech, it did not reach the district court's alternative bases for rejecting defendants' First Amendment claim: namely, that the injunction was also valid as a restriction on speech that incites imminent lawless action and that aids and abets criminal activity. *Id.* at 16-17.

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals erred by rejecting his First Amendment challenge to the preliminary injunction entered by the district court. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that the injunction could properly be applied to petitioner's book to the extent that it contained fraudulent or deceptive commercial speech. This Court has repeatedly made clear that false, fraudulent, or deceptive commercial speech, or commercial speech related to illegal activity, is unprotected by the First Amendment. See, *e.g.*, *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980).

Petitioner does not deny that the speech at issue was fraudulent or deceptive. Instead, he contends that the court of appeals' decision "seems to conflict with the Supreme Court's definition of 'commercial speech,'" Pet. 10, and that "commercial speech" should be "limited to 'advertising pure and simple,'" Pet. 11. Those contentions lack merit.

This Court has stated that the "core notion of commercial speech" is "speech which does no more than propose a commercial transaction." *Bolger* v. *Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983) (citation omitted). At times, however, the Court has "also suggested that * * * lesser protection was appropriate for a somewhat larger category of commercial speech—'that

is, expression related solely to the economic interests of the speaker and its audience.'" *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (quoting *Central Hudson*, 447 U.S. at 561). Although the Court has not yet established "the precise bounds of the category of expression that may be termed commercial speech," *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), it has never held that commercial speech comprises *only* "advertising pure and simple," as petitioner contends, but has instead held that a variety of other types of material constitutes commercial speech. See, *e.g.*, *Bolger*, 463 U.S. at 66-67 (informational pamphlets); *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979) (trade names).

This case is a poor vehicle for resolving any residual uncertainty as to the extent to which the category of commercial speech encompasses more than speech that merely proposes a commercial transaction. Although the court of appeals recognized (Pet. App. 10) that "[m]uch thought has gone into the question of what the Supreme Court really meant by the [larger] category of commercial speech" to which the Court referred in *Central Hudson*, the court of appeals did not purport to delineate the bounds of that category in this case. Instead, the court merely noted that petitioner's book contained commercial speech under any definition. Compare Pet. App. 9 (noting that portions of petitioner's book constituted commercial speech "[u]nder [petitioner's] definition"), with *id.* at 11 (suggesting that petitioner's "[e]xtravagant claims" constituted commercial speech under the broader definition set forth in *Central Hudson*). Moreover, the court of appeals did not suggest that the injunction would have been overbroad under any valid narrower definition of commercial speech, nor

does petitioner challenge any particular provision of the injunction as overbroad. Because the court of appeals' decision does not conflict with any decision of this Court concerning the definition of commercial speech, and because there is no indication that the court of appeals would have reached a different outcome even if it had expressly adopted a narrower definition, this Court's intervention is unwarranted.[1]

2. The court of appeals correctly upheld the injunction notwithstanding the fact that petitioner's book indisputably contains some fully protected speech. Where commercial speech is "inextricably intertwined" with otherwise fully protected speech, it is entitled to the fullest First Amendment protection. See, *e.g.*, *Board of Trs.* v. *Fox*, 492 U.S. 469, 474 (1989). A speaker, however, cannot "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 68 (citation omitted); see *Zauderer*, 471 U.S. at 637 n.7.

The court of appeals determined that the commercial-speech component of petitioner's book was not "inextricably intertwined" with the fully protected component, because petitioner could "relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his

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[1] Petitioner also suggests (Pet. 10, 12-14) that the court of appeals' decision conflicts with its earlier decisions in *American Academy of Sch. Management* v. *Joseph*, 353 F.3d 1099 (9th Cir. 2004); *Mattel, Inc.* v. *MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003); and *Hoffman* v. *Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). This Court, however, does not sit to resolve alleged intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, those decisions do not clearly adopt a different definition of "commercial speech" from that used in the decision below.

products." Pet. App. 14. Petitioner does not contend that the court of appeals' decision on that issue conflicts with any decision of this Court or of another court of appeals. To the contrary, courts of appeals have consistently upheld injunctions under 26 U.S.C. 7408 as permissibly regulating fraudulent or deceptive commercial speech—including in cases where, as here, the materials giving rise to the injunction contained both commercial speech and speech that was fully protected. See, *e.g.*, *United States* v. *Raymond*, 228 F.3d 804, 807, 815 (7th Cir. 2000) (materials providing information regarding "general tax-protest principles" and "forms and instructions that guide the purchaser through the process of 'de-taxing'"); *United States* v. *White*, 769 F.2d 511, 512, 516-517 (8th Cir. 1985) (materials containing "arguments against the constitutionality and legality of the federal tax system" and "detailed instructions" on how to evade taxes); see also *United States* v. *Estate Pres. Servs.*, 202 F.3d 1093, 1106 (9th Cir. 2000); *United States* v. *Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987); *United States* v. *Buttorff*, 761 F.2d 1056, 1066-1068 (5th Cir. 1985).

Crucially, the preliminary injunction issued by the district court did not directly enjoin petitioner from disseminating his book, but instead merely prohibited petitioner from, *inter alia*, "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes." Pet. App. 63. Petitioner thus remains free to disseminate his book without

material that is covered by the injunction.[2] And petitioner remains free to engage in other forms of "legitimate tax-related activities or advocacy," pending the district court's determination as to whether a permanent injunction is warranted. *Id.* at 62.

3. Finally, petitioner contends (Pet. 17-18) that the injunction is overbroad as applied to his book because the injunction separately enjoins him from selling the other products that the book promotes. This Court, however, traditionally refuses to consider arguments that were neither pressed in nor passed upon by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). In any event, petitioner's argument lacks merit. To the extent that petitioner's book promotes products whose sale would now be prohibited by the injunction, it contains "speech proposing an illegal transaction," which (like fraudulent or deceptive speech) "a government may regulate or ban entirely." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982). Petitioner cites no authority for the contrary proposition.

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[2] As a practical matter, petitioner could readily remove the offending material from his book because he publishes it himself. Moreover, as the district court noted (Pet. App. 48), the commercial speech contained in the book does not finance its publication.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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